EXPANDING TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 TO PROHIBIT STUDENT TO STUDENT SEXUAL HARASSMENT

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INTRODUCTION

"Intimate violation of women by men is sufficiently pervasive in American society as to be nearly invisible."[1] Catharine MacKinnon introduced the theory that sexual harassment of working women constitutes illegal sex discrimination with this statement in 1979. Today, sexual harassment in the workplace is no longer as invisible as it was thirteen years ago. In 1986, the United States Supreme Court held that certain forms of workplace sexual harassment violate Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment.[2] In 1991, the issue of sexual harassment received national attention when Professor Anita Hill claimed that Supreme Court nominee, now Justice, Clarence Thomas sexually harassed her while she worked under his supervi-

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1. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979) (citations omitted).

2. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Title VII provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988).

sion at the Department of Education ("DOE") and later at the Equal Employment Opportunity Commission ("EEOC").[3] Even as the American public questions the boundary between sexual harassment and flirtation, the public has reached an implicit consensus that the law should protect working women from at least some forms of unwelcome sexual attention.

Unfortunately, sexual harassment is not confined to the workplace. Accordingly, the public conversation about sexual harassment should not end with a discussion of employed women, nor should the protection provided by the law. Women encounter sexual harassment in almost every facet of their lives.[4] The current social climate, in which sexual harassment is a matter of public discourse and political import, provides an opportunity to expand the protection against sexual harassment into areas not presently covered by the law.

This Article examines a form of sexual harassment almost entirely overlooked in research, scholarship, and legislation: the problem of student to student sexual harassment in institutions of higher education.[5] Title IX of the Education Amendments of 1972 forbids

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3. Hill's claim was especially noteworthy given the fact that the EEOC is the federal agency primarily responsible for enforcing Title VII and protecting against discrimination in the workplace. 42 U.S.C. § 2000e-4 (1988).

4. *See* MACKINNON, *supra* note 1, at 25–55; *infra* text accompanying notes 40–52.

5. This Article exclusively addresses student to student sexual harassment in post-secondary education. Student to student sexual harassment, however, also occurs in secondary schools, and perhaps even earlier. As this Article was going to press, the American Association of University Women published a report summarizing two decades of research on bias against female students in preschool through high school. Among other findings, the "report found that sexual harassment of girls by boys is on the rise, in part, the authors say, because school authorities tend to dismiss the incidents as 'harmless instances of boys being boys.'" Jean Merle, *Schools Badly Shortchange Girls, Researchers Report*, L.A. TIMES, Feb. 12, 1992, at A5, A19. In reporting on sexual harassment at lower schools, the *New York Times* found:

> Recent visits to a high school and junior high school in California made it clear that coarse remarks and gestures were widespread. . . . In conversations with more than 150 girls and boys . . . virtually every student had experienced, witnessed or participated in such behavior. Most of the girls said they were troubled by the boys' behavior but felt helpless to respond. . . . Boys and girls also agreed that school personnel rarely took action.

Jane Gross, *Schools are Newest Arena for Sex-Harassment Cases*, N.Y. TIMES, Mar. 11, 1992, at A1, A18. *See also* CENTER FOR SEX EQUITY IN SCHOOL, TUNE INTO YOUR RIGHTS: A GUIDE FOR TEENAGERS ABOUT TURNING OFF SEXUAL HARASSMENT (1985); Miranda Van Gelder, *High School Lowdown*, MS., Mar./Apr. 1992, at 94.

While a discussion of student to student sexual harassment in lower education is beyond the scope of this Article, due to the different considerations when addressing young students as opposed to adult students, the problem needs to be more thoroughly

sex discrimination in educational institutions receiving federal funds.[6] The courts, however, have not definitively concluded that *all* forms of sexual harassment constitute sex discrimination;[7] thus, victims of student to student sexual harassment have no clear judicial remedy. The Department of Education, the agency charged with enforcing Title IX, acknowledged the existence of student to student sexual harassment as early as 1981.[8] Still, neither Congress nor the DOE have, as of yet, enacted any law or regulation specifically addressing the issue of student to student sexual harassment. Some educational institutions acknowledge that the problem exists,[9] yet few provide meaningful remedies for victims.[10] Moreover, there is little available scholarship specifically addressing student to student sexual harassment. The vast majority of the research concerning sexual harassment on campus focuses on sexual harassment of students by faculty members or administrators.[11] Researchers must address student to student sexual harassment as a distinct form of sex discrimination, just as lawmakers must forbid its practice and provide remedies for its victims.

Student to student sexual harassment can cause significant harm to its victims.[12] Therefore, it must be prohibited if women[13]

researched and appropriate remedies developed. It should be noted that Title IX prohibits sex discrimination in *all* educational institutions receiving federal funds. 20 U.S.C. § 1681 (1988).

6. Title IX provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1988).

7. *See* Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980); Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977); *infra* text accompanying notes 197–230.

8. *See infra* note 140 and accompanying text.

9. *See infra* text accompanying notes 37, 102–105.

10. Indeed, in some circumstances official policies against sexual harassment can provide the best evidence of a university's failure to recognize student to student sexual harassment. *See infra* text accompanying notes 98–100.

11. This type of harassment is more analogous to employer to employee harassment than to student to student sexual harassment because faculty or administrator harassment of students involves an unequal power relationship. *See infra* notes 26–30 and accompanying text.

12. *See infra* text accompanying notes 54–72.

13. The vast majority of sexual harassment is perpetrated by men against women; thus, this Article focuses solely on this form of harassment. Reilly et al., *Sexual Harassment of University Students*, 15 SEX ROLES 333–58 (1986) (75-90% of sexual harassment is perpetrated by men against women). Of course, women can sexually harass men, and both men and women can sexually harass members of the same sex. At least one court has found that Title VII does cover same-sex harassment. *See* Wright v.

are to have an equal opportunity for a meaningful educational experience as promised by Title IX.[14] Just as a victim of workplace sexual harassment may be unable to perform her job duties effectively,[15] a victim of student to student sexual harassment may suffer reduced success in the pursuit of her education.[16] Sexual har-

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Methodist Youth Serv., Inc, 511 F. Supp. 307 (N.D. Ill. 1981). It is not clear, however, whether Title VII prohibits harassment when the perpetrator harasses both men and women. *See* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In the case of the bisexual supervisor, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."). *See also* Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting), *aff'd*, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) ("[B]isexual harassment, however blatent and disturbing, is legally permissible."); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (In cases where a supervisor sexually harasses both men and women employees, the "harassment would not be based upon sex because both men and women are accorded like treatment."). Courts have not addressed the question of whether Title IX protection extends to cases of same-sex or bi-sexual harassment.

14. This Article does not address the problem of gender harassment on campus. Gender harassment is harassing conduct which is non-sexual in nature but is directed at an individual because of her sex. Examples of gender harassment include yelling non-sexual epithets at women participating in women's rights marches on campus and exaggerated yawning when women speak in class. *See* JEAN O'GORMAN HUGHES & BERNICE SANDLER, ASSOCIATION OF AMERICAN COLLEGES, PEER HARASSMENT: HASSLES FOR WOMEN ON CAMPUS 3–5 (1988) [hereinafter PEER HARASSMENT]. Some courts have held that Title VII covers gender harassment as well as sexual harassment. *See* Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (evidence that male employees urinated in female employees' gas tank and refused to repair her working equipment actionable under Title VII); McKinney v. Dole, 765 F.2d 1129, 1135 (D.C. Cir. 1985) (male employee's physically aggressive but not explicitly sexual conduct directed towards female employee may constitute sex discrimination under Title VII); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (signs stating "Men Only" posted in common working areas actionable under Title VII). *See also* Barbara L. Zalucki, Note, *Discrimination Law — Defining The Hostile Environment Claim of Sexual Harassment Under Title VII*, 11 W. NEW ENG. L. REV. 143, 170 (1989); Memorandum from EEOC Chairman Clarence Thomas, EEOC Policy Guidance on Current Issues of Sexual Harassment 18 (Oct. 25, 1988) [hereinafter EEOC Policy] ("[T]he Commission notes that sex-based harassment — that is, harassment not involving sexual activity or language — may also give rise to Title VII liability."). *But see* Turley v. Union Carbide Corp., 618 F. Supp. 1438 (S.D. W.Va. 1985) (non-sexual conduct, such as "picking on" women, not actionable under Title VII). Presumably the argument that gender discrimination should be actionable under statutes prohibiting sex discrimination can be made under Title IX as well.

15. MACKINNON, *supra* note 1, at 51; Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 551 (1987); Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 85 nn. 5–6. (1984-85). *See also Jacksonville Shipyards*, 760 F. Supp. at 1506–07 ("Victims of sexual harassment suffer stress effects from the harassment. Stress as a result of sexual harassment is recognized as a specific, diagnosable problem by the American Psychiatric Association. . . . Among the stress effects suffered are 'work performance stress' . . . 'emotional stress' . . . [and] physical stress.").

16. *See infra* text accompanying notes 59–63.

assment may cause both psychological harm, such as depression and anxiety, and physical harm, such as headaches and eating disorders.[17] Sexual harassment often forces the victim to alter her academic career by avoiding courses or majors in which she might encounter the harasser.[18] The repercussions from her compromised education may cause harm throughout the victim's life, especially in light of the premium society places on a strong academic record.[19]

Imagine a woman just starting college. A classmate asks her if he can photocopy her genitalia to satisfy one of the requirements of a fraternity scavenger hunt.[20] Or this woman lives in a dormitory and one night several dozen male students gather outside yelling 'We want tits, we want tits!" until a woman comes to a window to bare her breasts.[21] Or two male students approach a female African-American student on campus and inform her that their fraternity refuses to recognize them as men until they have sex with a woman of her race.[22] Or a woman is at a party in a campus dormitory and several men repeatedly grab her breasts or buttocks, or try to kiss her.[23] Or a female Asian-American student is invited to a fraternity party where the men want the women to play *Platoon* — *Platoon* being a movie in which men rape Asian women.[24] Or a woman student reads an advertisement for a wet tee-shirt contest as a fund-raising event in her school newspaper.[25] Can any of these

17. *See infra* text accompanying notes 55–56.

18. *Id.*

19. *See infra* text accompanying note 63. *See generally* IVORY POWER: SEXUAL HARASSMENT ON CAMPUS (Michele Paludi ed., 1987) [hereinafter IVORY POWER]; BILLIE W. DZEICH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS (1984).

20. This example is borrowed from PEER HARASSMENT, *supra* note 14, at 4.

21. *Id.* at 3.

22. *Id.* at 6. Harassment which attacks women on the basis of both their sex and race, color, or national origin exacerbates the harm of student to student sexual harassment. *See infra* notes 65–72.

23. PEER HARASSMENT, *supra* note 14, at 4.

24. *Id.* at 6. This scenario is another example of multiple harassment. *See infra* text accompanying notes 65–72.

25. PEER HARASSMENT, *supra* note 14, at 5. Proposals advocating limits on harmful speech, particularly speech involving the media, raise First Amendment issues which are beyond the scope of this Article. For a discussion of the First Amendment implications of regulations on harmful speech, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); John T. Shapiro, Note, *The Call For Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech*, 75 MINN. L. REV. 201 (1990).

women take unfettered advantage of their educational opportunities in an environment in which such activities are commonplace? Can any of these women feel fully respected as intelligent and valuable members of their campuses if the administrators permit such conduct?

If the type of harassment cited in these examples occurred in the workplace, the victim could seek a remedy under Title VII for the creation of a hostile environment. Title VII, under which most sexual harassment claims have been brought, prohibits two types of harassment: *quid pro quo*[26] harassment and hostile environment harassment.[27] *Quid pro quo* harassment involves a tangible threat or a promise of benefit to the victim, conditioned on her acceptance of the harasser's sexual advances. The most obvious example of *quid pro quo* harassment involves an employer telling an employee that she must have sex with him to keep her job. In *quid pro quo* harassment, a perpetrator usually holds some position of authority over the victim; thus he has the power to carry out his threat or promise. Hostile environment sexual harassment, by contrast, need not involve tangible promises of benefit or threats of punishment. Rather, it consists of unwelcome sexual attention that either creates an intimidating workplace or interferes with an employee's job performance.[28] Examples of the latter include unwelcome and repeated sexual jokes, remarks, physical contact, or pornographic displays.[29] Co-workers as well as supervisors can create a hostile environment in violation of Title VII.[30]

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26. *Quid pro quo* is defined as: "What for what; something for something. It is used in law for the giving [of] one valuable thing for another." BLACK'S LAW DICTIONARY 651 (5th ed. 1983).

27. Hostile environment sexual harassment is conduct which " 'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.' " Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (1985)).

28. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c) (1991) [hereinafter EEOC Guidelines].

29. *See, e.g., Meritor*, 477 U.S. 57; McKinney v. Dole, 765 F.2d 1129, 1139 (D.C. Cir. 1985); Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991). *But see* Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (pervasive displays of pornography in office and use of vulgarities by plaintiff's co-worker did not create a hostile environment in violation of Title VII).

30. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

While Title IX case law explicitly prohibits *quid pro quo* sexual harassment,[31] it is less clear whether Title IX also prohibits hostile environment sexual harassment.[32] Student to student sexual harassment, however, fits more neatly into the rubric of hostile environment than into *quid pro quo* harassment. Students do not have the institutionalized authority over other students which would permit them to commit *quid pro quo* harassment. For instance, a harassing male student cannot threaten a female student with a lower grade if she refuses his sexual advances. He can, however, create a hostile environment by forcing unwelcome sexual attention upon her. The unavailability of a hostile environment cause of action could leave students without redress for a wide range of sexually harassing conduct. For instance, students would not be protected against professors who engage in harassing behavior which does not clearly implicate a tangible benefit, such as a grade or a letter of recommendation.[33] Likewise, victims of student to student sexual harassment would be unprotected.

This Article proposes two remedies for the problem of student to student sexual harassment. The first proposal suggests judicial action, while the second proposes legislative or administrative solutions. Both remedies would extend Title VII jurisprudence to Title IX actions by declaring hostile environment sexual harassment illegal sex discrimination under Title IX. The first proposal recommends broad judicial interpretation of Title IX to include a prohibition against student to student sexual harassment. Such an interpretation would require recognition that hostile environment sexual harassment violates Title IX.[34] Under this proposal, a university would violate Title IX if it had notice of, but failed to remedy, such harassment. The second proposal suggests that Congress explicitly amend Title IX to prohibit student to student sexual harassment. Universities failing to comply with Title IX's provisions

31. *See* Alexander v. Yale Univ., 631 F.2d 178, 184 (2d Cir. 1980); Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989); Alexander v. Yale Univ., 459 F. Supp. 1, 3 (D. Conn. 1977); *infra* text accompanying notes 197–230.

32. *See Alexander*, 631 F.2d at 183; *Bougher*, 713 F. Supp. at 145; Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360, 1366 n.2 (E.D. Pa. 1985); *Alexander*, 459 F. Supp. at 3; *infra* text accompanying notes 197–230.

33. *See* Schneider, *supra* note 15; Kimberly Mango, Comment, *Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355 (1991).

34. The Supreme Court has already recognized hostile environment sexual harassment as a violation of VII. *Meritor*, 457 U.S. 57 (1986). *See also infra* text accompanying notes 291–292.

against student to student sexual harassment would face delay or loss of federal funding.[35] Alternatively, the DOE could interpret the current Title IX language to include a prohibition against hostile environment sexual harassment. Under such an interpretation, the DOE could promulgate regulations requiring universities to adopt policies forbidding student to student sexual harassment and to provide effective grievance procedures for victims.[36]

Part I of this Article analyzes the incidence, types, and consequences of student to student sexual harassment. This Part explains the silence surrounding student to student sexual harassment and describes how universities generally address the problem of sexual harassment. Part II outlines the current prohibitions against sex discrimination under Title IX, details how courts presently interpret these regulations, briefly reviews the treatment of hostile environment sexual harassment under Title VII, and analyzes how

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35. *See infra* text accompanying notes 291–292. Congress and the federal courts are not the only institutions with the power to remedy student to student sexual harassment. Universities can do a great deal to prevent such harassment by promulgating effective policies against such harassment. For a discussion of the creation and implementation of sexual harassment polices, see K. C. Wagner, *Prevention and Intervention: Developing Campus Policy and Procedures*, INITIATIVES, Winter 1990, at 37; Mary Kay Biaggio et al., *Strategies for Prevention*, *in* IVORY POWER, *supra* note 19, at 213; Dorothy O. Helly, *Institutional Strategies: Creating A Sexual Harassment Panel*, *in* IVORY POWER, *supra* note 19, at 231.

Graduate schools, such as law and medical schools, are often required to recommend students for membership in professional associations. This power of recommendation may provide, and even require, an additional source of control over student conduct that is not available at the undergraduate level. In response to an incident of sexual harassment at The Law Center of the University of Southern California, Dean Scott Brice sent an open letter to all students, faculty, and staff stating:

> An incident of sexual harassment of a female law student has been reported to me. . . . [She] recently found in her Law Center mailbox a letter which included pornographic photographs and a description of various sexual activities. . . . It is presently unclear whether the perpetrator of this incident is a law student. . . . If this incident was perpetrated by a student . . . this incident would seriously jeopardize my willingness to certify the student's good moral character and fitness for admission to the Bar.

Letter from Scott Brice, Dean of The Law Center of the University of Southern California, to Law Center Students, Faculty, and Staff (Feb. 10, 1992) (on file with author).

State legislatures can also enact prohibitions against student to student sexual harassment in universities. Under a state human rights statute, Minnesota forbids discrimination on the basis of sex in its educational institutions and defines sexual harassment as a form of sex discrimination. MINN. STAT. §§ 363.01(14), 363.03(5) (West 1991). Minnesota also requires all schools to adopt written policies forbidding sexual harassment and sexual violence, and to provide grievance procedures for victims of sexual harassment or sexual violence. MINN. STAT. § 127.46 (West Supp. 1992). *See also* WIS. STAT. §§ 36.11(22)-36.12 (1991).

36. *See infra* note 294 and accompanying text.

courts have grappled with hostile environment sexual harassment claims brought under Title IX. Part III proposes a framework within which courts could address student to student sexual harassment claims under a broad interpretation of Title IX. Finally, Part IV presents both a model congressional amendment to Title IX prohibiting student to student sexual harassment in educational institutions receiving federal funds, and model regulations which the DOE could promulgate to prohibit student to student sexual harassment under the current language of Title IX.

I. AN OVERVIEW OF STUDENT TO STUDENT SEXUAL HARASSMENT

Over the last several years, researchers and college administrators have documented numerous incidents of student to student sexual harassment and assessed the damage of such harassment. Recently, the Dean of Cornell University revealed:

> Sexual harassment among peers has been responsible for some of the most unfortunate incidents on campuses in recent months. On my own campus, 37% of undergraduate women reported being subjected to the more serious forms of unwanted sexual attention by their fellow students, and 62% of undergraduate women believed that the majority of female students at Cornell experienced a wide range of unwanted behavior, including sexual coercion and bribery by their fellow students.[37]

The first section of this Part demonstrates that student to student sexual harassment occurs frequently on college campuses nationwide. The second section provides evidence that student to student sexual harassment causes psychological and physical harm to its victims and threatens their educational opportunities. The third section attempts to explain why victims of such harassment often remain silent. The fourth section demonstrates how universities address the problem of sexual harassment on campus.

A. *What It Looks Like: The Face of Student to Student Sexual Harassment*

When she began researching the sexual harassment of working women, Catharine MacKinnon had very few statistics or studies from which she could draw. She had no choice but to address "sexual harassment as women report experiencing it."[38] The same is

37. Frank Rhodes, *The Moral Imperative to Prevent Sexual Harassment on Campus*, INITIATIVES, Winter 1990, at 1, 2.

38. MACKINNON, *supra* note 1, at 25.

now true of student to student sexual harassment. Very little available research specifically addresses the phenomenon of student to student sexual harassment.[39]

The Association of American Colleges' Project on the Status and Education of Women compiled a report in 1988 entitled "Peer Harassment: Hassles For Women on Campus" ("Peer Harassment Report"). The Peer Harassment Report provides the most thorough exploration to date of the occurrence and harm of student to student sexual harassment.[40] According to the Peer Harassment Report, student to student sexual harassment occurs on all types of campuses — large and small, public and private, religious and secular[41] — but only three universities have conducted surveys about this type of harassment on their own campuses. In 1986, Cornell found that seventy-eight percent of its women students reported having been the target of sexist remarks and sixty-eight percent reported receiving unwelcome attention from men students.[42] At the Massachusetts Institute of Technology, ninety-two percent of women students reported experiencing some form of unwelcome sexual attention.[43] At the University of Rhode Island, seventy percent

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39. Others studying student to student sexual harassment report the same lack of data:

> Because little has been written about this subject, we depend heavily, in this report, on our own extensive files and on anecdotal materials gathered from numerous campus reports and campus newspapers. Additionally, innumerable conversations with students, faculty members, and administrators at a large number of campuses confirm the existence of peer harassment on campus and provide additional examples.

PEER HARASSMENT, *supra* note 14, at 2. A congressional inquiry similarly found:

> The Congress finds that . . . although annual "National Campus Violence Surveys" indicate that roughly 80 percent of campus crimes are committed by a student upon another student and that approximately 95 percent of the campus crimes that are violent are alcohol-or-drug-related, *there are currently no comprehensive data on campus crime*.

Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2384 (Nov. 8, 1990) (emphasis added).

40. Although the Peer Harassment Report is entitled "Peer Harassment: Hassles For Women on Campus," almost every incident it reported involved harassment of a clearly sexual nature — in other words, sexual harassment.

41. PEER HARASSMENT, *supra* note 14, at 2.

42. *Id.* (citing WARREN BROWN & JEAN MAESTRO-SCHERER, CORNELL INSTITUTE FOR SOCIAL AND ECONOMIC RESEARCH, ASSESSING SEXUAL HARASSMENT AND PUBLIC SAFETY: A SURVEY OF CORNELL WOMEN 23 (1986)).

43. *Id.* (citing Elizabeth Salkind, Can't You Take A Joke? A Study of Sexual Harassment Among Peers 63 (1986) (M. thesis, Massachusetts Institute of Technology)).

of the women reported that they had been "sexually insulted" by a man student.[44]

Despite the lack of studies, other than the Peer Harassment Report, specifically addressing student to student sexual harassment, studies which focus on "general"[45] sexual harassment of university women, by any perpetrator, underscore the prevalence of sexual harassment in women's lives. In a comparative study of sexual harassment on two university campuses — a midwestern and a west coast college — researchers submitted a Sexual Experiences Questionnaire ("SEQ") to women students.[46] The SEQ questioned students about their experiences with five types of behavior: 1) gender harassment (generalized sexist remarks and behavior); 2) seductive behavior (inappropriate and offensive, but generally sanction-free, sexual advances); 3) sexual bribery (solicitation of sexual activity or other sex-linked behavior by promise of reward); 4) sexual coercion (coercion of sexual activity by threat of punishment); and 5) sexual assault (gross sexual imposition or assault).[47]

At the west coast university, close to seventy-six percent of the respondents experienced at least one type of harassment. Most of the harassment was either gender harassment or seductive behavior, but over eight percent of the women surveyed reported unwelcome stroking or fondling. Only three percent of the women reported the harassment to campus authorities. The vast majority remained silent either because they felt the harassment was not serious enough to report, or because they feared they would be labelled as liars or troublemakers.[48] At the midwestern university, fifty percent of the

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44. *Id.* (citing ASSESSMENT FOR SEXUAL HARASSMENT WITHIN THE UNIVERSITY OF RHODE ISLAND COMMUNITY: A REPORT OF AN INVESTIGATION BY THE ASSESSMENT TASK GROUP OF THE SEXUAL HARASSMENT COMMITTEE 26 (1980)). Unfortunately, the Peer Harassment Report does not explain what specific types of sexually harassing conduct the term "sexually insulted" covers.

45. The term "general" indicates sexual harassment perpetrated by any man against a woman student. Most sexual harassment studies focus on "general" harassment insofar as the studies are not limited to sexual harassment perpetrated by one category of men. Thus, general sexual harassment studies typically ask women students "Have you ever been sexually harassed while a student at college?" rather than "Have you ever been sexually harassed by a fellow student (or faculty member or administrator, etc.) while a student at college?"

46. Louise Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152 (1988).

47. These five categories are frequently used by researchers surveying the sexual harassment of students. *See* Frank Till, NATIONAL ADVISORY COUNCIL ON WOMEN'S EDUCATIONAL PROGRAMS, SEXUAL HARASSMENT: A REPORT ON THE SEXUAL HARASSMENT OF STUDENTS (1980).

48. Fitzgerald et al., *supra* note 46, at 162.

respondents experienced some form of harassment, with a similar breakdown in types of harassment and reasons for not reporting the incidents.[49]

Another study focused on sexual harassment of sorority women. The 1986 study polled 174 sorority women at a large southwestern university and found that thirty percent of the respondents reported forced touching of intimate parts while enrolled at the university.[50] Another study delivered at the annual meeting of the American Sociological Association reported that one in four female students is sexually harassed in the university setting.[51]

In addition to such studies, student to student sexual harassment appears even more prevalent when commonly accepted behavior is re-labelled as sexual harassment. The Peer Harassment Report suggests that the following examples of student conduct are forms of sexual harassment: "scoping," which occurs when men publicly rate the attractiveness, on a one to ten scale, of a woman walking by them; shouting obscenities at women; "mooning," which occurs when men pull down their pants and expose their buttocks to a woman; surrounding a single woman and demanding that she expose her breasts before she can leave a room or a party; vandalizing sororities in the middle of the night in a version of the "panty raid;" giving women pornographic material in class or slipping it under their doors; and displaying sexually explicit posters in common areas such as student lounges.[52] Sexual harassment occurs whenever such activity takes place, and few women emerge from higher education without experiencing or witnessing such conduct.

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49. *Id.*

50. George Rivera & Robert Regoli, *Sexual Victimization of Sorority Women*, 72 SOC. & SOC. ISSUES 39 (1987).

51. Mary Sullivan & Deborah I. Bybee, *Female Students and Sexual Harassment: What Factors Predict Reporting Behavior*, J. NAT'L ASS'N FOR WOMEN DEANS, ADMINISTRATORS & COUNSELORS, Winter 1987, at 12 (citing D. Benson & G. Thomson, Sexual Harassment on a University Campus, Paper Delivered Before the Am. Sociological Ass'n (1980)). Numerous similar studies address general sexual harassment of students on campus. *See* N. Maihoff & L. Forrest, *Sexual Harassment in Higher Education: An Assessment Study*, J. NAT'L ASS'N FOR WOMEN DEANS, ADMINISTRATORS & COUNSELORS, Spring 1983, at 46; K. Reilly, *A Study of Sexual Harassment* (1978), *cited in* Sullivan & Bybee, *supra*, at 11; DZEICH & WEINER, *supra* note 19, at 13–15.

52. PEER HARASSMENT, *supra* note 14, at 4–6. *See also supra* text accompanying notes 20–25. For a first-hand account of student to student sexual harassment at Princeton University, see Lela Demby, *In Her Own Voice*, *in* IVORY POWER, *supra* note 19, at 183.

B. *The Harm of Student to Student Sexual Harassment*

> *Some men*
> *have no language that doesn't hurt*
> *a language that doesn't reduce what's whole*
> *to some part of nothing.*[53]

Victims of student to student sexual harassment may experience a range of psychological and physical symptoms which are part of the "sexual harassment syndrome."[54] The symptoms victims may experience include:

> -general depression, as manifested by changes in eating and sleeping patterns, and vague complaints of aches and pains that prevent the student from attending class or completing work;
> -undefined dissatisfaction with college, major, or a particular course;
> -sense of powerlessness, helplessness, and vulnerability;
> -loss of academic self-confidence and decline in academic performance;
> -feelings of isolation from other students;
> -changes in attitudes or behaviors regarding sexual relationships;
> -irritability with family and friends;
> -fear and anxiety;
> -inability to concentrate;
> -alcohol and drug dependency.[55]

A pamphlet prepared for college students at the University of California Los Angeles ("UCLA") states that harassing or intimidating behavior can "interfere with your pursuit of an education, cause you to fear for your personal safety, keep you from participating fully in the campus community, undermine or lower your self esteem, affect your health, limit your freedom of movement, [and] make you mistrustful of others."[56] Simply put, "it is difficult for students to learn in an environment where they feel unsafe."[57] Perhaps Adrienne Rich states the problem most eloquently:

> Women and men do not receive an equal education because outside the classroom women are perceived not as sovereign beings but as prey. . . . More subtle, more daily than rape is the

53. NTOZAKE SHANGE, *Some Men*, *in* A DAUGHTER'S GEOGRAPHY 37 (1983).

54. Vita Rabinowitz, *Coping With Sexual Harassment*, *in* IVORY POWER, *supra* note 19, at 103, 112 (citing TONG, WOMEN, SEX, AND THE LAW (1984)). *See also* Mary P. Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, *in* IVORY POWER, *supra* note 19, at 78 (citations omitted).

55. Rabinowitz, *supra* note 54, at 103, 112 (citing TONG, WOMEN, SEX, AND THE LAW (1984)).

56. DIVISION OF STUDENT AND CAMPUS LIFE, UNIVERSITY OF CALIFORNIA LOS ANGELES (UCLA), PEER HARASSMENT AND INTIMIDATION AT UCLA (1990).

57. AILEEN ADAMS & GAIL ABARBANEL, SEXUAL ASSAULT ON CAMPUS 6 (1988).

> verbal abuse experienced by the woman student on many campuses . . . where, traversing a street lined with fraternity houses, she must run a gauntlet of male commentary and verbal assault. The undermining of self, of a woman's sense of her right to occupy space and walk freely in the world, is deeply relevant to education. The capacity to think independently, to take intellectual risks, to assert ourselves mentally, is inseparable from our physical way of being in the world, our feelings of personal integrity. If it is dangerous for me to walk home late of an evening from the library . . . how self-possessed, how exuberant can I feel as I sit working in that library?[58]

Student to student sexual harassment, and university tolerance of such conduct, send a message to a female student that she can be turned into a sexual object at a male student's whim. Such an injury can deeply undermine a woman's academic confidence. "The cumulative effect of repeated harassment can be devastating. It reinforces self-doubt and can affect a woman's entire academic performance."[59] Such harm can be exacerbated by the fact that victims often try to cope with the harassment alone because they may feel too confused, frightened, powerless, alienated,[60] or guilty to turn to others.[61]

Unchecked harassment may force a woman to significantly alter her academic course of study. "Staying away [from the sexual harasser] means that women are forced to drop courses, to alter schedules, sometimes to change majors or colleges because they feel they have no other recourse."[62] Such interruptions of course work reflect poorly on a student's academic record and seriously reduce the benefits she reaps from her education. Consequently, the dam-

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58. ADRIENNE RICH, *Taking Women Students Seriously*, *in* ON LIES, SECRETS, AND SILENCE 237, 241–42 (1979).

59. PEER HARASSMENT, *supra* note 14, at 2.

60. Victims of sexual harassment may experience alienation if they find that other women consider some forms of sexual harassment flattering. The fact that some women may enjoy conduct which others consider sexual harassment suggests the problem of "false consciousness," which "treats some women's views as unconscious reflections of their own oppression, complicitous in it." Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence*, 8 SIGNS 635, 637–38 n.5 (1983). *See also* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 622–26 (1990); Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); PEER HARASSMENT, *supra* note 14, at 5–6.

61. DZEICH & WEINER, *supra* note 19, at 84. *See also* Koss, *supra* note 54, at 74.

62. DZEICH & WEINER, *supra* note 19, at 86. A study at Harvard University revealed that 12% of undergraduates who had been sexually harassed changed their majors as a result of the harassment. Koss, *supra* note 54, at 78.

age caused by student to student sexual harassment may negatively impact the victim's entire career.[63]

Allowing student to student sexual harassment to remain unchecked can lead to more severe forms of violence against women, such as date rape.

> Generally, the men who commit acquaintance rape do so because of their attitudes about male and female sex roles. Rape is arguably the ultimate sexual harassment . . . . Both a rape victim and a victim of sexual harassment will experience emotional trauma such as betrayal, alienation, anger and fear. . . . In a college setting, a rape victim and a victim of sexual harassment are similar in additional ways . . . . Each may fear public disclosure of her experiences or reliving the trauma in a court or in an administrative hearing.[64]

The damage caused by student to student sexual harassment escalates when the harassment targets women of racial or ethnic minorities.[65] Examples of such multiple harassment include sexual comments or overtures made to African-American women which draw on the stereotypical assumption that they have voracious sexual appetites,[66] or comments made to Asian-American women sug-

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63. In Brown v. Board of Education, the Supreme Court stated: "Today, education is perhaps the most important function of state and local governments. . . . [Education] is the very foundation of good citizenship." 347 U.S. 483, 493 (1954). Other commentators agree: "Formal education is, in the United States, an important factor in an individual's career possibilities and personal development; therefore stunting or obstructing that person's educational accomplishments can have severe consequences." Phyllis Crocker & Anne Simon, *Sexual Harassment in Education*, 10 CAP. U. L. REV. 541, 542 (1981).

64. Terry Nicole Steinburg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. (J. COLLEGE & UNIV. L.) 52, 53 (1991) (citations omitted).

65. To increase the understanding of the nature and harm of student to student sexual harassment, researchers need to conduct further studies specifically analyzing the sexual harassment of women of color. Darlene DeFour has noted the "Eurocentric" bias in sexual harassment literature: "[I]n the majority of the [sexual harassment] studies the researchers have failed to look at the impact of sexual harassment on women of color." Darlene DeFour, *The Interface of Racism and Sexism on College Campuses*, *in* IVORY POWER, *supra* note 19, at 45. For a discussion of the harm caused by racist speech, see Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 MIAMI L. REV. 127 (1987).

66. *See* PEER HARASSMENT, *supra* note 14, at 6. Other instances of sexual harassment of African-American women have been reported. At the University of Virginia, a flyer advertising a party distributed by the Phi Gamma Delta fraternity contained the following racially derogatory statement: "No short w — ps and please no nega babes." Harris, *Hindman's "Nega" Example Reveals Problem*, CAVALIER DAILY (Univ. of Virginia), Nov. 10, 1988, at 2, *cited in* Matsuda, *supra* note 25, at 2333 n.71. At the University of Michigan, the campus radio broadcast the following "joke" from a call-in student listener: "Who are the most famous black women in American history? Aunt Jemima and Mother Fucker." Wiener, *Racial Hatred on Campus*, NATION, Feb. 27, 1989, at 260, *cited in* Lawrence, *supra* note 25, at 433 n.14. At the University of Wis-

gesting that they make good girlfriends because Asian-American women supposedly submit passively to the the demands of men.[67]

Multiple harassment places the victim in a sort of double jeopardy,[68] in which sexist and racist stereotypes collide. These stereotypes often stem from deeply held and historically based notions about women of color. For instance, bell hooks describes how white slaveholders created myths about the insatiable sexuality of African-American women to justify rampant sexual exploitation of these women.[69] Moreover, multiple sexual harassment reinforces societal power imbalances by attacking women who hold little power in society.[70] Finally, victims of multiple harassment may find that lawmakers are not likely to believe or protect them. The law takes the abuse of white women more seriously than the abuse of women of color.[71]

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consin, white students shouted "I've never tried a nigger before" as they followed African-American students across campus. *A Step Towards Civility*, TIME, May 1, 1989, at 43, *cited in* Lawrence, *supra* note 25, at 448 n.74

67. *See* Mitsuye Yamada, *Invisibility is an Unnatural Disaster: Reflections of an Asian American Woman, in* THIS BRIDGE CALLED MY BACK 35–40 (Cherríe Moraga & Gloria Anzaldúa eds., 1983).

68. Kimberlé Crenshaw is responsible for this characterization. Kimberlé Crenshaw, Remarks at University of Southern California (Nov. 18, 1991).

69. BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 51–68 (1981). *See also* Judith Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 784 (1991).

70. The economic disparity between white and minority women is just one example of the power imbalance between these groups of women. On average, white women earn more than African-American, Asian, and Latina women. *See* RISKS AND CHALLENGES: WOMEN, WORK AND THE FUTURE 146–48 (Wider Opportunities For Women ed. 1990) (African-American women earn less than white women), *cited in* Winston, *supra* note 69, at 779 n.20; MAKING WAVES: AN ANTHOLOGY BY AND ABOUT ASIAN AMERICAN WOMEN 192 (Asian Women United of Cal. ed. 1989) (Asian women earn less than white women), *cited in* Winston, *supra* note 69, at 779 n.20; NATIONAL COUNCIL OF LA RAZA, HISPANICS IN THE WORKFORCE, PART II: HISPANIC WOMEN 5-8 (1988) (Latinas earn less than white women), *cited in* Winston, *supra* note 69, at 779 n.20.

71. A recent study in Texas revealed that a conviction for raping an African-American woman or Latina carries an average two or five year sentence, respectively, compared with the average ten year sentence for the rape of a white woman. *Study in Dallas Finds Race Affects Sentences*, N.Y. TIMES, Aug. 20, 1990, at A13. African-American men convicted of rape receive an average sentence of 4.2 years if the victim is also African-American, compared with an average of 16.4 years if the victim is white. Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 121 n.113 (1983). Angela Harris notes that every rape case in which the death penalty was imposed by the state of Maryland in 1968 involved a white victim. Angela P. Harris, *Race and Essentialism*, 42 STAN. L. REV. 581, 600–01 (1990). During slavery, rape of an African-American woman was not considered a crime, and during slavery and reconstruction unsubstantiated claims that an African-American man raped a white woman

> The failure to examine incidence rates of sexual harassment among women of color is alarming when one realizes that she may be particularly vulnerable to this form of victimization. . . . [W]omen who fall prey to harassment are often financially vulnerable. Women of color frequently hold positions which result in their economic vulnerability . . . . The images and perceptions of women of color also increase their vulnerability to harassment. Theses images either portray the women as weak and thus unlikely to fight back if harassed, or they are perceived as very sexual and thus desiring sexual attention.[72]

Within the context of an educational institution, multiple harassment reminds victims in no uncertain terms that they are unaccepted and unacceptable as intellectual peers. Their role, the harassment tells them, is to fulfill sexual stereotypes, not to participate in an academic community.

C. *Explaining The Silence: Why Victims Often Fail to Report Student to Student Sexual Harassment*

> *Some men would rather see us dead than imagine*
> *what we think of them/*
> *if we measure our silence by our pain*
> *how could all the words*
> *any word*
> *ever catch us up*
> *what is it*
> *we cd call equal.*[73]

If student to student sexual harassment is a problem on college campuses, why have more victims not brought the issue to public light? The reasons for these victims' silence are similar to the reasons why so many other forms of abuse of women remain unnamed and unreported.[74] Women may not know that sexually harassing

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often provided a justification for lynching African-American men. "Black women have simultaneously acknowledged their victimization and the victimization of black men by a system that has consistently ignored violence against women while perpetrating it against men." *Id.*

72. DeFour, *supra* note 65, at 47–48.

73. NTOZAKE SHANGE, *supra* note 53.

74. Abuse of women in the home or within the context of personal relationships has traditionally been considered a private issue and thus beyond the reach of the law. *See* Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 623 (1986). Sexual harassment has been, and often still is, treated by the courts as a personal problem with which courts should not interfere. *See, e.g.*, Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989) (court characterizes alleged sexual harassment as "plaintiff's complaints of problems in her personal relationship with defendant . . . which is not action prohibited or regulated by Title IX."). *See also* MACKINNON, *supra* note 1, at 28 ("Until very recently issues analogous to sexual harassment, such as abortion, rape, and wife

conduct is wrong. They may believe it is normal or even biologically inevitable. Even if a woman recognizes that sexual harassment is wrong, she may fear that reporting the conduct will lead to more harassment, public shame, or other negative repercussions. Victims may also fear that they will not be believed.

Imagine yourself, or your daughter, living away from home for the first time, facing academic challenges while perhaps just beginning to explore your sexuality. A few men students repeatedly harass you, making you very upset, and as a result you miss several classes and cannot concentrate on your studies. But you also see other women similarly victimized. And perhaps a professor, or a resident dormitory manager, witnesses the behavior but does nothing to stop it. You stop by the student services center for advice, but none of the available information clearly indicates that there was anything wrong with the way you were treated. And you cannot explain the lack of information with the excuse that the student service staff is insensitive, because they do supply information about date rape and faculty to student sexual harassment.[75]

You might well conclude that the conduct which upset you and jeopardized your grades is just part of the college experience, that you were being oversensitive and uptight, and that maybe the conduct is the "natural" way men and women interact. When harassing behavior occurs daily, when everyone observes it, knows about it, and allows it to continue, the person hurt by the behavior may not understand that the behavior is wrong. A female victim of student to student sexual harassment may not realize that she *is* a victim. Student to student sexual harassment does not yet have its own name. It is called flirtation when it is bearable, a personality conflict when it intensifies, and perhaps date rape if it remains unchecked.

Society teaches women both that sexual harassment is a "normal" part of everyday life and that it is private issue between individual men and women. This dual fallacy prevents women from recognizing sexual harassment as sex discrimination and denies women the right to be free from such conduct:

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beating existed at the level of an open secret in public consciousness, supporting the (equally untrue) inference that these events were infrequent as well as shameful, and branding the victim with the stigma of deviance.").

75. Title IX requires all universities receiving federal funds to promulgate policies against sex discrimination. 34 C.F.R. § 106.9(a) (1991). Many institutions interpret these regulations to prohibit harassment perpetrated by university employees. *See infra* text accompanying notes 98–100.

> To call something personal is to make it too small, too unique, too infinitely varied, and too private to be considered appropriately addressed by law. . . . Similarly, but at the other end of the scale, to call something natural or biological . . . is to render it too big, too immutable, too invariant, too universal and thus, too presocial to be within the law's reach. Both characterizations, while rationalizing legal noninvolvement, make sexual harassment socially and culturally permissible by locating its determinants beyond the social and cultural sphere.[76]

Myths about sexual harassment and male sexuality carry an additional bite in the university environment. Campus administrators and courts alike often suggest that young men are just discovering their sexuality and cannot be expected to control their strong sexual urges.[77] Members of the college community sometimes espouse such reasoning when responding to charges of gang rape by fraternity men:

> The rationalization for this behavior illustrates a broader social ideology of male dominance. Both the [fraternity] brothers and many members of the broader community excuse the behavior by saying that 'boys will be boys' and that if a woman gets into trouble it is because 'she asked for it,' 'she wanted it,' or 'she deserved it.' The ideology inscribed in this discourse represents male sexuality as more natural and more explosive than female sexuality. . . . The women who satisfy these urges are included as passive actors in the enactment of a sexual discourse where the male, but not the female, sexual instinct is characterized as an insatiable biological instinct and psychological need.[78]

The myth that sexual harassment is a natural, and therefore acceptable, expression of male sexuality may stop victims from seeking help through official grievance procedures. "Although many campuses, in compliance with the law, have student/faculty committees to hear sexual harassment cases, most committees are underutilized, in part because the victims of sexual harassment are conditioned to experience their harassment as 'normal' — the way

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76. MACKINNON, *supra* note 1, at 83. "In *Alexander*, Yale's attorneys argued that no plaintiff could represent a class of sexually harassed women students to whom the university had allegedly been unresponsive because each incident is 'necessarily personal and particularized.'" *Id.* at 85 (citing Memorandum in Support of Motion for Stay of Discovery (May, 1978), Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977)).

77. *See* PEGGY REEVES SANDAY, FRATERNITY GANG RAPE (1990). *See also* Michele A. Paludi et al., *Myths and Realities: Sexual Harassment on Campus*, *in* IVORY POWER, *supra* note 19, at 7 (Courts use a 'natural/biological' model of sexual harassment which "maintains that harassing behavior is a natural expression of men's stronger sex drive and/or any person may be attracted to another person and pursue that attraction without intent to harass."); Merle, *supra* note 5.

78. SANDAY, *supra* note 77, at 11–12.

things are and always will be."[79] Even women who initially report student to student sexual harassment may face institutional barriers which eventually silence them and their allegations. Both employers and universities typically demonstrate a reluctance to believe women who report sexual harassment:

> Institutional responses to sexual harassment are typically defensive: "It didn't happen, if it did happen, it wasn't intentional, even if it did happen, the woman brought it on herself due to her particular personality; even if it did happen, the good work done by the discriminator or the institution outweighs the bad."[80]

Women frequently experience an increased level of harassment after they report sexual harassment in the workplace, as well as accusations that they are trying to discredit or publicly embarrass their employer.[81] Similarly, a woman who reports student to student sexual harassment may well face increased harassment and alienation from her peers and hostility from her educational institution.[82] "Students are . . . inhibited [from bringing Title IX actions] by the perception that the institution will defend the accused har-

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79. Katherine Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the 'Hate Speech' Debate*, 1990 DUKE L.J. 574, 579.

80. Koss, *supra* note 54, at 73, 77. Even when the institution believes the harassment did occur, the administration may try to resolve the incident discreetly to avoid negative publicity. For instance, Judge Forer reports that when a resident at Harvard's teaching hospital sexually assaulted several patients, the president of Harvard, Derek Bok, admitted: "Rather than discipline the culprit or insist upon appropriate psychiatric treatment, those in charge arranged for him to leave quietly and then sent letters of recommendation to other hospitals without mentioning the circumstances of his departure." Judge Lois G. Forer, *Forward* to SANDAY, *supra* note 77, at xxi.

81. Koss, *supra* note 54, at 77–88. Of 88 women who filed complaints of sexual harassment with the California Fair Employment and Housing Department, almost half were fired, and another quarter left their jobs out of fear or frustration. *Id.* at 78 (citations omitted). The EEOC acknowledges the problem of retaliation: "Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct." EEOC Policy, *supra* note 14, at 7. A random sample of women who objected to, but did not necessarily report, sexual harassment in the federal workplace reveals that almost half believed speaking up "made no difference." Koss, *supra* note 54, at 77, (citing U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981)). Anita Hill, who received hundreds of letters from women recounting their own experiences of sexual harassment after Hill testified to the Senate Judiciary Committee, reports:

> We . . . know what happens when we 'tell.' We know that when harassment is reported the common reaction is disbelief or worse. . . . Women who 'tell' lose their jobs. A typical response told of in the letters to me was: I not only lost my job for reporting harassment, but I was accused of stealing and charges were brought against me.

Anita Hill, *The Nature of the Beast*, Ms., Jan./Feb. 1992, at 32.

82. Sandra Shullman & Barbara Watts, *Legal Issues*, *in* IVORY POWER, *supra* note 19, at 251, 258.

asser. Reprisals may come from peers; sexual harassment is somewhat like rape in that the victim may find herself stigmatized because she brought the charge."[83]

The pressure to remain silent is undoubtedly exacerbated by the way society, often through the media, shames and attacks women who speak publicly of sexual violence.[84] We witnessed the acute discomfort Anita Hill suffered when relating the specifics of Clarence Thomas's (alleged) harassment of her and when members of the Senate and various witnesses attempted to discredit her charges as mere fantasy.[85] During the date rape trial of William Kennedy Smith,[86] the media focused on Patricia Bowman's alleged sexual promiscuity, drug abuse, and mental instability.[87] Women who ask society to condemn sexual harassment and violence are themselves put on trial: it is the woman's veracity and character, not the man's conduct, which are scrutinized and judged.[88] If a young woman fears she will face even a fraction of what Professor Hill or Patricia Bowman endured — vicious queries into motives,

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83. *Id.*

84. Robin Morgan summarizes the range of criticisms a woman might face if she reports sexual violence:

> [I]f she has ever been 'in trouble' before she will be said to have set him up; if she has a pristine history, she is a prude; if the accused is poorer than her, she is classist; if he is richer, she is a gold digger; if she is a woman of color accusing a white man, she is a crazy; f she is a white woman accusing a man of color, she is a racist; if she and the accused are both persons of color, she is a traitor to her race; if she and the accused are both white, she provoked him. If he is powerful, she is an opportunist, or a pawn of his enemies.

Robin Morgan, *Bearing Witness*, Ms., Jan./Feb. 1992, at 1.

85. *See* Guy Gugliotta, *Kennedy Speaks Up: Senator Rebukes Republicans for Accusing Anita Hill of Perjury, 'Fantasy Stories,' Being a Tool of Others*, WASH. POST, Oct. 14, 1991, at A18; Rosenthal, *White House Role in Thomas Defense Initially Split: Bush Aides Opt for Attack Against Accuser*, N.Y. TIMES, Oct. 14, 1991, at A1.

86. William Kennedy Smith, a member of the Kennedy family, was accused of and tried for "date raping" Patricia Bowmen. Kennedy and Bowman met at a bar, after which she voluntarily returned with him to his beachfront family home. Bowman alleged that Kennedy raped her while they were taking a walk on the beach. The jury found Kennedy not guilty after a trial which received widespread publicity.

87. *See Drug Use Raised in Kennedy Case*, L.A. TIMES, June 25, 1991, at A14; Mary Jordan, *Smith Lawyer: Accuser had "Psychological Disorder,"* WASH. POST, Aug. 10, 1991, at A1; Ronald Ostrow, *Smith Seeks AIDS Test on his Accuser*, L.A. TIMES, May 31, 1991, at A22; Larry Rohter, *Lawyers in Smith Case Seek Woman's Mental Records*, N.Y. TIMES, Aug. 10, 1991, at A5.

88. SUSAN ESTRICH, REAL RAPE 42–71 (1987). *See also* Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1304 (1991); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1777 (1991).

background, and sexual tastes — it is no wonder she may choose to remain silent.

Finally, victims of sexual harassment also face the threat that men possess the power to do more than harass women. Being sexually harassed is bad enough, but being raped, otherwise physically threatened, or denied a much-needed benefit may be worse. If a woman speaks publicly about sexual harassment, she may risk greater injury from angry men.[89] The woman who remains silent may get away with suffering "only" the harassment. For a young woman, unsure whether what she experienced was wrong and not her fault, scared that she will be at best humiliated and at worst physically injured, silence may present a more attractive option.[90]

D. *Institutional Policies Addressing Sexual Harassment*

The regulations implementing Title IX's prohibition against sex discrimination require universities to promulgate policies against sexual harassment.[91] Many of these policies are limited in scope to harassment perpetrated by persons in positions of authority over the victim, and, as such, frequently exclude harassment perpetrated by students against students. In addition to sexual harassment policies, some institutions also voluntarily promulgate peer harassment codes that may reach some forms of student to student sexual harassment. While peer harassment codes are evidence that *some* universities assume responsibility for regulating student behavior, such codes are not required under any federal law. Thus, as the law leaves the decision to implement peer harassment codes to each university's individual discretion, students cannot be assured that their university will choose to provide such protection against harassing conduct perpetrated by other students.

1. Sexual Harassment Policies

Title IX explicitly requires all universities receiving federal funds to implement policies against sexual harassment and provide grievance procedures easily accessible to the entire campus commu-

89. *See supra* text accompanying notes 82–83. *See also* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 833 (1991).

90. There are other reasons why students may not report sexual harassment. *See* Koss, *supra* note 54, at 75 (victims of sexual harassment remain silent in an attempt to deny both their victim status and their sense of powerlessness); Rabinowitz, *supra* note 54, at 110 (students often do not report faculty to student sexual harassment to avoid harm, such as public shame or loss of job, to the harasser).

91. Title IX requires these specific measures against sex discrimination. 34 C.F.R. §§ 106.4–106.9 (1991). *See infra* notes 124–136 and accompanying text.

nity. The policy adopted by UCLA closely parallels the EEOC Guidelines on Discrimination on the Basis of Sex ("EEOC Guidelines") promulgated under Title VII,[92] as do other campus sexual harassment policies.[93] UCLA's policy provides:

> The University of California is committed to creating and maintaining a community in which students, faculty, and administrative and academic staff can work together in an atmosphere free from all forms of harassment, exploitation, or intimidation, including sexual. Specifically, every member of the University community should be aware that the University is strongly opposed to sexual harassment and that such behavior is prohibited by both the law and by University policy. It is the intention of the University to take whatever action may be needed to prevent, correct, and if necessary, discipline behavior which violates this policy.
>
> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (A) submission to such conduct is made either explicitly or implicitly a term or condition of instruction, employment, or participation in other University activity; (B) submission to or rejection of such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions affecting an individual; or (C) such conduct has the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive University environment.
>
> In determining whether the alleged conduct constitutes sexual harassment, consideration shall be given to the record of the incident as a whole and to the totality of the circumstances, including the context in which the alleged incidents occurred.[94]

Sections (A) and (B) assume a perpetrator who is in a position of authority over the victim, as the submission to the harassment must be a "term or condition of instruction, employment, or participation," or be "used as a basis for evaluation." A student cannot exercise power over the specific conditions of a fellow student's education, nor do students officially evaluate each other. While section (C) of the second paragraph could be interpreted to prohibit student to student sexual harassment, a pamphlet explaining the policy explicitly defines sexual harassment as involving a person in a position

92. 29 C.F.R. §§ 1604.11(a), (b) (1991).

93. For other examples of campus sexual harassment policies, see Elaine D. Ingulli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281, 324–42 (1987); *infra* text accompanying notes 98–100.

94. UCLA STANDARD PROCEDURES MANUAL, PROCEDURE NO. 630, UNIVERSITY POLICY ON SEXUAL HARASSMENT 1–2 (1990).

of authority over the victim.[95] "Preventing sexual harassment before the fact: . . . . If you are offended by the behavior of *someone in a position of authority*, make your feelings known, and tell the person to stop."[96] Additionally, another pamphlet accompanying the sexual harassment policy recommends two statements a victim should make in confronting her harasser. Both statements assume that the harasser is a professor or administrator: "A clear, verbal expression of your disapproval may stop the behavior from continuing: 'I don't want you to touch me — I'd prefer our relationship to be strictly professional,' [or] 'I'm not interested in becoming involved with you, and I expect this won't affect my grade in your class.' "[97] Guidelines such as these, which assume that the harasser and victim hold unequal positions of authority, may lead students to believe that student to student sexual harassment does not "qualify" as sexual harassment in the eyes of their university.

Some university sexual harassment policies are explicitly limited to faculty or administrator harassment, thus clearly excluding student to student sexual harassment. For example, Duke University's sexual harassment policy states: "Sexual harassment may be egregious or less serious; regardless of degree, it abuses the *student-teacher relationship* and has no place in the academic community."[98] The University of Washington's policy provides: "Sexual discrimination, in the form of sexual harassment, defined as the *use of one's authority* or power to coerce another individual into sexual relations or to punish the other for his/her refusal, shall be a violation of the University of Washington's human rights policy."[99] Even the National Advisory Council on Women's Educational Programs advocates the following definition:

> Academic sexual harassment is *the use of authority* to emphasize the sexuality or sexual identity of the student in a manner which prevents or impairs that student's full enjoyment of educational benefits, climate, or opportunities.[100]

Such policies fail to acknowledge that sexual harassment may occur, and indeed does occur with great frequency, between peers.

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95. UCLA, SEXUAL HARASSMENT: YOU MAY NOT KNOW WHAT IT IS, BUT YOU KNOW HOW IT MAKES YOU FEEL (1985).

96. *Id.* (emphasis added).

97. WOMEN'S RESOURCE CENTER, UCLA, SAYING "NO" TO SEXUAL HARASSMENT: INFORMAL APPROACHES TO DEALING WITH THE PROBLEM (1986).

98. Schneider, *supra* note 15, at 529 n.20 (emphasis added).

99. *Id.*

100. DZEICH & WEINER, *supra* note 19, at 21–22.

Universities may at least implicitly address the problem of student to student sexual harassment by identifying sexual harassment as one factor contributing to date rape.[101] A pamphlet on date rape warns:

> There tends to be a common pattern that occurs leading up to a date rape. First there is an intrusion into a woman's physical and/or psychological space (e.g.: a hand on her shoulder or thigh) testing her response. Since this behavior is often subtle, the woman may try to ignore this potential signal to future aggression.[102]

While it is encouraging that universities are recognizing the link between sexual harassment and date rape, student to student sexual harassment needs to be addressed and remedied as a problem in its own right.

2. Peer Harassment Policies

Many universities incorporate peer harassment policies into student conduct codes. Peer harassment policies, which are not required by federal law, prohibit a wide range of student conduct harmful to other students. Some peer harassment policies could be interpreted to cover the problem of student to student sexual harassment. For instance, UCLA's policy provides:

> Chancellors may impose discipline for violation of University policies or campus regulations. Such violations include the following types of misconduct: The use of 'fighting words' by students to harass any persons on University property. . . . 'Fighting words' are those personally abusive epithets which, when directly addressed to any ordinary person, are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity,

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101. Administrative recognition of date rape is an effective way to bring controversial and often misunderstood subjects into open discussion. When students and administrators at Duke University participated in a mock date rape trial, Bartlett and O'Barr found:

> Such events, legitimized by the support and participation of well-placed university administrators and student groups, bring hidden everyday dilemmas involving sexual oppression out into the open, where they can be revealed, taken seriously, and debated in a setting which is both real and yet controlled. They not only educate the university population about a pervasive campus problem, but also inform many women that their concerns and perspectives are important to the university.

Bartlett & O'Barr, *supra* note 79, at 585.

102. WOMEN'S RESOURCE CENTER, UCLA, DATE RAPE: WHAT YOU NEED TO KNOW (1987).

> religion, *sex*, sexual orientation, disability, and other personal characteristics. 'Fighting words' constitute 'harassment' when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.[103]

An explanatory pamphlet defines verbal and physical sexual harassment as forms of peer harassment.[104] An accompanying brochure prepared for students "is designed to help you understand and make use of a variety of UCLA policies created to address and prevent acts of . . . harassment . . . whether by an individual student or by groups of students."[105] However, when the UCLA administration learned that a UCLA fraternity wrote and distributed to its members a "songbook" containing extremely sexually explicit and sexually violent lyrics, the administration failed to sanction the fraternity despite the fear and outrage expressed by many women students.[106] If universities like UCLA fail to enforce peer harassment codes, the protection such codes purport to offer seems almost meaningless.

Prohibitions against peer harassment sometimes do lead to sanctions against student to student sexual harassment. Santa Clara University suspended a fraternity for at least four years for distributing a newsletter containing language "repugnant, obscene, and wantonly degrading to women, racial minorities, and homosexuals."[107] Indiana University administrators placed residents of a male dormitory on a one-year probation for serenading a woman's dormitory with a sexually suggestive song, despite a plea by a dormitory official that the song was "an ice-breaker for setting up so-

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103. UCLA, POLICIES APPLYING TO CAMPUS ACTIVITIES, ORGANIZATIONS, AND STUDENTS (Part A) § 51.xx (1989) (emphasis added). Other campuses which have adopted policies specifically addressing harassing student speech include: Brown University, Emory University, Pennsylvania State University, Tufts University, Trinity College, the University of Connecticut, the University of North Carolina at Chapel Hill, and the University of Pennsylvania. Shapiro, *supra* note 25, at 202 n.9. Such policies are open to legal challenge as violative of students' First Amendment rights. *See* Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (hate speech policy held unconstitutional due to vagueness and overbreadth); *see also supra* note 25.

104. DIVISION OF STUDENT AND CAMPUS LIFE, UCLA, PEER HARASSMENT AND INTIMIDATION AT UCLA: WHAT CAN BE DONE? (1986).

105. *Id.*

106. Eric Malnic, *Fraternity Songbook Celebrates Violence On Women*, L.A. TIMES, Mar. 5, 1992, at B1; Katrina Foley & Sheila Moreland, *The Dirty Secret in Fraternity Drinking Songs—Sexual Harassment*, L.A. TIMES, Mar. 15, 1992, at M6.

107. *Sexist Newsletter Brings Suspension*, ON CAMPUS WITH WOMEN, Fall 1990, at 5 (quoting James Briggs, Vice-President of Student Services, Santa Clara University).

cial events with female residents."[108] The University of Richmond rugby team suspended a member for a season for advertising an upcoming game with a violent and pornographic poster.[109]

While peer harassment codes take a meaningful step towards preventing student to student sexual harassment, such codes alone do not adequately address the problem. Peer harassment codes are not required under Title IX or any other federal legislation; thus many universities may simply decide not to provide such protection. The decision whether or not to adopt a peer harassment policy, and the extent of the protection provided by such a policy, is left to the complete discretion of each individual university. Students should not have to rely on the individual discretion of their university to protect them against student to student sexual harassment.

II. THE PROHIBITION AGAINST SEXUAL HARASSMENT UNDER TITLE IX

This Part describes the current status of statutory and judicial protections against sex discrimination under Title IX and provides a background against which proposals for regulating student to student sexual harassment can be assessed. The first section provides a brief legislative history of Title IX. The second section reviews the regulations promulgated by the DOE under Title IX. The third section surveys the treatment of hostile environment sexual harassment claims under Title VII, an understanding of which is necessary for the fourth section, which examines the judicial treatment of hostile environment claims brought under Title IX.

A. *The Legislative History of Title IX*

Before 1971, Congress never seriously considered the problem of sex discrimination in institutions of higher education. In 1964, Congress passed Title VI of the Civil Rights Act, which prohibited discrimination on the basis of race, color, or national origin in all programs receiving federal funds.[110] Despite the fact that a prohibition against discrimination based on sex was clearly absent from Title VI, Congress refused to rectify this gap by imposing such a prohibition when it allocated federal funds for universities through

108. *Sexually Suggestive Songs Unwelcome at Indiana U.*, ON CAMPUS WITH WOMEN, Spring 1989, at 4.

109. *Controversial Rugby Poster at U. of Richmond*, ON CAMPUS WITH WOMEN, Fall 1989, at 7.

110. 42 U.S.C. § 2000(d) (1988).

the Higher Education Act of 1965.[111] One commentator suggests that the congressional failure to include a prohibition against sex discrimination in the Higher Education Act funds stemmed from a reluctance to restrain the autonomy of universities, a fear of quotas determining admissions to universities, a sense that Title VI alone would sufficiently prevent most forms of discrimination, and disagreement about the severity of sex discrimination in universities.[112]

The issue of sex discrimination received widespread attention in 1970 during the national debate over the Equal Rights Amendment ("ERA"). Although the ERA was never ratified, the new focus on sex discrimination forced Congress to take the issue more seriously than it had in 1964 and 1965. In 1971, Congress began considering the need to revise the Education Act of 1965 to provide more funds for higher eduction. In this debate, which eventually led to the Education Amendments of 1972, Congress grappled with whether to include a clause prohibiting recipients from discriminating on the basis of sex.[113] The debate mainly focused on sex discrimination in the admissions process:[114] thus, the legislative history contains very little discussion of sex discrimination that might occur after a student is admitted to a university[115] and there is no discussion of sexual harassment as a form of sex discrimination. Most of the objections to the sex non-discrimination requirement focused on the damage such a policy would do to single-sex institutions,[116] including military academies,[117] and the limitations it would impose on academic freedom.[118] Despite these objections, Congress finally passed Title IX in December of 1972.

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111. Pub. L. No. 89-329, 1965 U.S.C.C.A.N. (79 Stat.) 1230, *cited in* Mango, *supra* note 33, at 366. The Higher Education Act specifically provided:

> Nothing contained in this chapter shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision or control over the curriculum, program of instruction, administration, or personnel of any educational institution.

Id.

112. Mango, *supra* note 33, at 367.

113. 117 CONG. REC. 30403 (1971) (statement of Sen. Bayh), *cited in* Mango, *supra* note 33, at 372.

114. 117 CONG. REC. 30411 (1971); 117 CONG. REC. 39253 (1971), *cited in* Mango, *supra* note 33, at 373.

115. Mango, *supra* note 33, at 372.

116. 117 CONG. REC. 30406 (1971) (statement of Sen. Dominick); 117 CONG. REC. 39251 (1971) (statement of Sen. Green), *cited in* Mango, *supra* note 33, at 375, 377.

117. 228 CONG. REC. 5813 (1972), *cited in* Mango, *supra* note 33, at 375. *See also* Mango, *supra* note 33, at 379.

118. Indeed, the House passed its version of the Education Amendment bill only after including an amendment limiting the application of the non-discrimination clause

B. *Regulations Promulgated Under Title IX*

Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[119] The language of Title IX mirrors that of Title VI, which prohibits discrimination on the basis of race in programs receiving federal funds.[120]

The Department of Education, Office of Civil Rights ("OCR"), is charged with enforcing Title IX.[121] A victim of sex discrimination can either try to resolve the problem through her campus internal grievance procedure or take her complaint directly to the OCR.[122] The OCR will mediate with the breaching institution to try to bring the institution into compliance with Title IX. If mediation between the OCR and the noncomplying institution fails, the

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to graduate institutions. H.R. 7248, 92d Cong., 1st Sess. (1971); 117 CONG. REC. 39261, 39353-54 (1971), *cited in* Mango, *supra* note 33, at 378.

119. 20 U.S.C. § 1681(a) (1988). Students *employed* by a university, for instance as teachers' assistants or on work study projects, can seek a remedy for sexual harassment under Title VII. Title VII's protection does not extend to students who are not also employees of the university.

In 1984, the Supreme Court in Grove City College v. Bell held that a Title IX plaintiff must demonstrate that the particular program or department charged with sex discriminatory conduct received federal funds. 465 U.S. 555, 570–74 (1984). Thus, the fact that individual programs at a university received federal funds did "not trigger institution-wide coverage under Title IX." *Id.* at 573. This burden of tracing the allocation of federal dollars to a specific program presented an enormous barrier to a Title IX plaintiff, and was so time-consuming that often the statute of limitations would run before a plaintiff could satisfy the *Grove City* requirement. *See* Mango, *supra* note 33, at 392. In 1987, Congress reversed the impact of *Grove City* with the Civil Rights Restoration Act ("CRRA"). 20 U.S.C. § 1687 (1988). The CRRA provides that Title IX covers an entire institution any part of which receives federal aid. "For the purposes of this Chapter, the term 'program or activity' and 'program' mean all the operations of . . . a college, university, or other postsecondary institution." *Id.*

120. Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1988). Title IX and Title VI share other similarities besides just language. Most importantly, the Title IX regulations adopt and incorporate all of Title VI's procedural provisions. 34 C.F.R. § 106.71 (1991) ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."). *See also* Mango, *supra* note 33, at 386–90.

121. 34 C.F.R. §§ 106.1–106.71 (1991).

122. 34 C.F.R. § 106.7 (1991). *See also* K. Lee Berthal, *Sexual Harassment in Education Institutions: Procedure For Filing a Complaint with The Office For Civil Rights, Department of Education*, 10 CAP. U. L. REV. 585 (1981).

OCR can take the case to an administrative law judge or refer it to the Department of Justice for further prosecution.[123]

The regulations promulgated under Title IX require every educational institution applying for federal financial assistance to provide assurances that the institution will operate in compliance with Title IX.[124] The institution must adopt policies against sex discrimination and provide adequate grievance procedures to resolve complaints of sex discrimination.[125] In addition, the institution must appoint at least one employee responsible for carrying out these Title IX requirements. The institution also must take on-going steps to notify new members of the university community of the policies and grievance procedures concerning sex discrimination.[126]

Title IX's regulations prohibit specific types of sex discrimination against enrolled students, including discrimination in student housing or other facilities,[127] access to course offerings,[128] counselling services,[129] financial assistance,[130] student employment assistance,[131] health and insurance benefits and provisions,[132] and athletics.[133] Title IX's protection is not limited to these enumerated areas, however: the regulations further provide that "[A] recipient shall not, on the basis of sex: . . . (7) [o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity."[134] The remaining regulations prohibit discrimination in admissions[135] and provide for certain exemptions.[136]

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123. Robert M. Hendrickson et al., *The Impact of The Civil Rights Restoration Act on Higher Education*, 60 W. EDUC. L. REP. 671, 672 (1990). The National Women's Law Center and the Women's Equity Action League have criticized the OCR's failure to handle complaints in a timely fashion and to include the complainant in settlement procedures. *See* Schneider, *supra* note 15, at 531–32 n.34.

124. 34 C.F.R. § 106.4(a) (1991).

125. 34 C.F.R. § 106.9(a) (1991).

126. 34 C.F.R. § 106.8(a) (1991).

127. 34 C.F.R. §§ 106.32–106.33 (1991).

128. 34 C.F.R. § 106.34 (1991).

129. 34 C.F.R. § 106.36 (1991).

130. 34 C.F.R. § 106.37 (1991).

131. 34 C.F.R. § 106.38 (1991).

132. 34 C.F.R. § 106.39 (1991).

133. 34 C.F.R. § 106.41 (1991).

134. 34 C.F.R. § 106.31(b)(7) (1991).

135. 34 C.F.R. §§ 106.15–106.23 (1991).

136. Title IX exempts the following from its coverage: educational institutions controlled by religious organizations; military educational institutions; traditionally single-sex institutions; fraternities and sororities; the YMCA and YWCA; Girls Scouts, Boy Scouts, and Camp Fire Girls; American Legion Boys Conferences or Girls Conferences; father-son or mother-daughter activities; and scholarships relating to beauty pageants. 20 U.S.C. §§ 1681(a)(2)–(9) (1991).

Nowhere in the Title IX regulations is sexual harassment even mentioned. Unlike the EEOC's Title VII Guidelines,[137] the DOE has not promulgated an official definition of sexual harassment nor any regulations addressing sexual harassment. In 1981, the DOE issued a policy memorandum stating: "Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX."[138] However, because the DOE never codified this definition by including it in the official Title IX regulations, it carries little weight and is rarely cited by courts hearing Title IX claims.[139]

The DOE acknowledged the existence of student to student sexual harassment in 1981, but did not decide whether or how to provide remedies for such harassment under Title IX:

> The other unresolved issue relates to a recipient's responsibility for the sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other student(s). . . . A theory upon which a more expansive institutional liability would be placed is premised on a Title VII case [in which] [l]iability was premised on the theory that co-workers and supervisors had interfered with the employment relationship to the degree that the work environment was not free from sex discrimination.[140]

Eleven years later, the DOE has still not resolved its position on student to student sexual harassment.

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137. 29 C.F.R. § 1604.11 (1991). The EEOC Guidelines provide:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

138. Office for Civil Rights of the Department of Education Policy Memorandum from Antonio Califa, Director of Litigation, Enforcement and Policy Service, Office of Civil Rights, to Regional Civil Rights Directors, Title IX and Sexual Harassment Complaints 2 (Aug. 31, 1981) [hereinafter DOE Policy]. This definition specifically limits coverage to employees and agents of the a university and, thus, would provide no protection for victims of student to student sexual harassment. *See* Mango, *supra* note 33, at 381.

139. Mango, *supra* note 33, at 381.

140. DOE Policy, *supra* note 138, at 10.

Title IX allows the DOE to take serious sanctions against non-complying institutions. Universities found to discriminate on the basis of sex are subject to withdrawal of federal funds under Title IX.[141] The language of Title IX mandates:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of failure to comply with such requirement . . . or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.[142]

While the possibility of withdrawing or delaying federal assistance seems daunting, the DOE very rarely invokes this power. No institution has ever lost its funding under Title IX, and in only a few cases has funding been delayed pending compliance.[143]

By neglecting to either officially define sexual harassment or to take a position on student to student sexual harassment, the DOE

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141. Plaintiffs can also bring private Title IX actions to federal court without first bringing a complaint to the OCR. Cannon v. University of Chicago, 441 U.S. 677 (1979). *See infra* note 193. A federal court can award monetary damages to victims of intentional sexual harassment. The Supreme Court recently resolved a split in the circuits by holding that a victim of intentional sexual harassment could recover monetary damages under Title IX. In Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992), the Court allowed a high school student, Christine Franklin, to recover monetary damages after her teacher continually harassed her and coerced her into sexual intercourse. *Id.* at 1231. Although the school administrators knew the teacher was harassing Franklin and other girl students, the administration took no action to stop the harassment. The Court held: "From the earliest years of the Republic, the Court has recognized the power of the judiciary to award appropriate remedies to redress injuries actionable in federal court . . . ." *Id.* at 1234. According to the Court, Congress never specifically indicated an intent to restrict the scope of remedies available for violations of Title IX. "Without in any way altering the existing rights of action and the corresponding remedies permissible under Title IX . . . Congress broadened the coverage of th[is] antidiscrimination provision[ ] in [the Civil Rights Restoration Act of 1987]. . . . We cannot say, therefore, that Congress has limited the remedies available to a complainant in a suit brought under Title IX." *Id.* at 1236.

142. 20 U.S.C. § 1682 (1988).

143. Mango, *supra* note 33, at 396 ("The problem with such a remedy, however, is the judicial reluctance to deprive educational institutions of their needed financial support."); Robert Sullivan, *Toughening Title IX: A Supreme Court Ruling Should Boost Women's Sports*, SPORTS ILLUSTRATED, Mar. 23, 1992, at 10 (Of the 1,025 Title IX complaints alleging sex discrimination in sports programs, not one has resulted in a cutback of federal funds.). *See also* DZEICH & WEINER, *supra* note 19, at 20–21; Bernice Sandler, *Women on Campus: A 10-Year Retrospect*, 26 ON CAMPUS WITH WOMEN 3 (1980), *cited in* Mango, *supra* note 33, at 396 n.160.

has failed to provide leadership in resolving the problem of such harassment. The lack of effective regulatory control of student to student sexual harassment, however, has not prevented students from turning to the courts for protection against such harassment. Before the final section addresses how courts resolve these claims, the next section provides a background in hostile environment theory as it has developed under Title VII.

C. *The History of Hostile Environment Claims Under Title VII*

Because most sexual harassment theory has developed under Title VII, both the courts and this Article draw upon Title VII case law in considering whether Title IX's prohibition of sexual harassment extends to student to student sexual harassment. This section provides a brief overview of the hostile environment prong of Title VII law as background for an inquiry into the treatment of hostile environment sexual harassment under Title IX.

Title VII provides: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, or national origin."[144] The EEOC Guidelines, which define sexual harassment as a form of sex discrimination, provide:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[145]

Sections (1) and (2) cover *quid pro quo* harassment, which courts recognized as a Title VII violation early in the history of sex discrimination law.[146] It was not until 1986, however, that the Supreme Court confirmed that conduct covered by section (3), crea-

144. 42 U.S.C. § 2000e-2(a) (1988).

145. 29 C.F.R. § 1604.11(a) (1991).

146. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

tion of a hostile environment,[147] also constituted actionable sex discrimination.[148]

In the 1986 case, *Meritor Savings Bank, FSB v. Vinson,*[149] the Supreme Court held that the creation of a hostile environment qualifies as sex discrimination under Title VII, regardless of whether the victim suffered a tangible job detriment.[150] *Meritor* involved a claim by a bank teller that her supervisor subjected her to a range of sexually harassing behavior, including repeated demands for sexual favors in the office, fondling her in front of other employees, following her into the women's restroom, and exposing himself to her.[151] The Court cited the EEOC Guidelines favorably and found that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment.' "[152] The Court refused to hold that Title VII prohibited only tangible economic harm,[153] declaring: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[154] The Court thus paved the way for future victims of hostile work environments to seek redress in the courts.

Meritor followed several lower court decisions holding that creation of a hostile environment violated Title VII's prohibition against race and sex discrimination in the workplace.[155] In 1971, the Fifth Circuit in *Rodgers* v. *EEOC* permitted a Latina employee to bring a Title VII case against her employer on the basis that the employer created a hostile ethnic environment by providing inferior service to its Latino clients.[156] The *Rodgers* court recognized that, as patent discrimination became illegal, employers would look for more subtle and sophisticated ways to perpetuate inequalities in the

147. For an interesting critique of the hostile environment sexual harassment theory, see Estrich, *supra* note 89, at 839–47.

148. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

149. *Id.*

150. *Id.*

151. *Id.* at 60.

152. *Id.* at 64 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 444 U.S. 991 (1971)).

153. *Id.* The Court remanded the case to the district court for consideration of the hostile environment claim. *Id.* at 73.

154. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

155. Courts recognized that a racially hostile environment violated Title VII as early as 1977. Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977).

156. Rodgers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

workplace.[157] The *Rodgers* court emphasized that the creation of a hostile environment was harassment prohibited by the congressional mandate to end discrimination in the workplace.

In 1981, the District of Columbia Circuit in *Bundy v. Jackson*[158] explicitly stated that sexual harassment need not implicate tangible job benefits, nor involve physical harassment, to be actionable under Title VII. In *Bundy*, an employee of a federal agency claimed that two of her supervisors continually requested sexual favors from her and that another supervisor to whom she reported the harassment told her that "any man in his right mind would want to rape you."[159] The *Bundy* court held that sexual stereotyping or slurs alone can constitute a hostile environment in violation of Title VII.[160] The *Bundy* court feared that a narrower interpretation of Title VII would permit "an employer [to] sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible action against her. . . ."[161]

In 1982, the Eleventh Circuit in *Henson* v. *City of Dundee*[162] established a five-part test for hostile environment sexual harassment claims.[163] To succeed in her claim, the plaintiff must first show that she belongs to a protected class.[164] Since sex is a protected class under Title VII, any plaintiff can easily fulfill this requirement. Second, she must demonstrate that she was subject to unwelcome sexual attention.[165] In so doing, the plaintiff must show that she did not solicit the attention and regarded the conduct as undesirable or offensive.[166] Third, the plaintiff must show that the alleged harassment was based on her sex. In other words, she must

157. *Id.* at 239.

158. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

159. *Id.* at 939–40.

160. *Id.* at 945. A district court hearing a Title VII sexual harassment claim explained how sexual stereotyping contributes to a hostile environment:

> The sexualization of the workplace imposes burdens on women that are not borne by men. . . . Women must constantly monitor their behavior to determine whether they are eliciting sexual attention. They must conform their behavior to the existence of the sexual stereotyping either by becoming sexy and responsive to the men who flirt with them or by becoming rigid, standoffish, and distant so as to make it clear that they are not interested in the status of sex object.

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1505 (M.D. Fla. 1991).

161. *Bundy*, 641 F.2d at 945.

162. 682 F. 2d 897 (11th Cir. 1982).

163. *Id.* at 903–05.

164. *Id.* at 903.

165. *Id.*

166. *Id.*

show that but for the fact that she was a woman, she would not have been harassed.[167] Fourth, she must show that the harassment affected a term, condition, or privilege of her employment.[168] Finally, for a court to hold an employer liable for the harassing acts of its employees, the plaintiff must show that the employer knew or should have known of the harassment and failed to take remedial action.[169] Applying this test, the court in *Henson* allowed the plaintiff, a police dispatcher, to proceed with allegations that the chief of police created a hostile environment by constantly using sexual vulgarities, making inquiries about the plaintiff's sexual practices, and requesting that the plaintiff engage in sexual relations with him.[170]

In 1986, the Sixth Circuit refused to find a hostile environment in the widely criticized case *Rabidue v. Osceola Refining Co.*[171] In *Rabidue*, the court found that the plaintiff failed to demonstrate a hostile environment despite showing that she was routinely denied perks enjoyed by men at her job level, often referred to as a clerical employee despite her position as an administrative assistant, forced to endure a co-worker who frequently referred to women, including the plaintiff, as "whores," "cunts," "pussies," and "tits," and assigned an office in which numerous pornographic posters were displayed.[172] The court held that the plaintiff had "the burden of proving that the defendant's conduct would have . . . affected seriously the psychological well-being of a reasonable employee."[173] The *Rabidue* court further held that courts evaluating hostile environment claims should consider "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, *coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.*"[174] In so stating, the *Rabidue* court implied that a woman

167. *Id.* at 903–04.

168. 682 F.2d 897, 904 (11th Cir. 1982).

169. *Id.* at 905.

170. *Id.* at 899.

171. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The *Rabidue* decision has been criticized in Ellison v. Brady, 924 F.2d 872, 877 n.6 (9th Cir. 1991); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1986); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1526 (M.D. Fla. 1991); Barbetta v. Chemlawn Services Corp., 669 F. Supp 569, 573 n.2 (W.D.N.Y. 1987).

172. *Rabidue*, 805 F.2d at 623–24 (Keith, J., dissenting in part).

173. *Id.* at 620.

174. *Id.* (emphasis added).

entering a male-dominated workplace assumes the risk for some of the sexual harassment she might encounter.

Considering all the facts, the *Rabidue* court reasoned:

> [T]he sexually oriented poster displays had a *de minimis* effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places. In sum, [her co-worker's] vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive.[175]

Thus, the court declared the conduct Rabidue suffered acceptable, implying that she was unreasonable in finding such behavior unduly offensive. Under the *Rabidue* analysis, sexual harassment of working women would rarely be actionable so long as other, less regulated sectors of society continue to demean women. As MacKinnon argues: "[i]f the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable."[176]

In a strong dissent, Judge Keith criticized almost every aspect of the *Rabidue* majority opinion. He found that the facts of the case revealed an antifemale atmosphere which interfered with plaintiff's working environment and her ability to perform her job.[177] He strongly disagreed with the majority's statement that a woman assumes the risk of sexual harassment when she enters a predomi-

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175. *Id.* at 622.

176. CATHARINE A. MACKINNON, *Sexual Harassment, in* FEMINISM UNMODIFIED 115 (1987). Susan Estrich is equally critical of the *Rabidue* majority opinion:

> [T]he fact that a hazard is widespread should be a reason to ban it, not to tolerate it. The greater the number of women who are exposed to sexual harassment, the more of a reason strict standards are needed. If harassment is viewed as a wrong, then its very commonness is an argument to "get tough." Consider the analogy to drug use. Few would accept the argument that its prevalence means that employers should be more tolerant of it. There is no analogous view in the narcotics situation of "There's no harm in trying — as long as it's sporadic or casual." On the contrary, spot checks of everyone, suspected or not, have become the rule of the day. Vigilance. Zero tolerance. No leniency. These are the catchwords of the day. Yet harassment can destroy a woman's health and well-being more quickly than marijuana use. Our insistence on thinking about sexual harassment differently reveals the depth of our acceptance of sexual harassment as appropriate workplace behavior.

Estrich, *supra* note 89, at 844–45. *See also Jacksonville Shipyards*, 760 F. Supp. at 1526.

177. *Rabidue*, 805 F.2d at 625 (Keith, J., dissenting in part).

nantly male workplace.[178] He concluded that "no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative."[179]

In 1990, the Ninth Circuit in *Ellison v. Brady*[180] agreed with many of Judge Keith's arguments. Kerry Ellison, an employee of the Internal Revenue Service ("IRS") complained that her co-worker sent her "bizarre . . . long, passionate, disturbing"[181] letters describing how "he had been 'watching' and 'experiencing' her"[182] and expressing a desire to develop a relationship with her.[183] Ellison's supervisor transferred the co-worker to another office, but allowed him to return after six months. Frantic at the prospect of his return, Ellison herself requested a transfer.[184] The IRS rejected the complaint filed by Ellison because it "did not describe a pattern or practice of sexual harassment covered by the EEOC regulations."[185] The EEOC affirmed the dismissal of Ellison's complaint on the basis that the IRS "took adequate action to prevent the repetition of . . . the conduct."[186]

Ellison took her complaint to federal court, and, in an important holding, the Ninth Circuit declared that "sexual harassment violates Title VII where the conduct creates an intimidating, hostile, or offensive environment *or* where it unreasonably interferes with work performance."[187] The *Ellison* court developed a three-part test for hostile environment claims.

> [A] hostile environment exists when an employee can show (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[188]

178. *Id.* at 626.
179. *Id.* at 626–27.
180. 924 F.2d 872 (9th Cir. 1991).
181. *Id.* at 880.
182. *Id.*
183. *Id.* at 874.
184. *Id.*
185. *Id.* at 875.
186. Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991).
187. *Id.* at 876–77.
188. *Id.* at 875–76 (citations omitted).

The *Ellison* court also adopted the reasonable woman standard for hostile environment claims.[189] The reasonable woman standard, an alternative to the reasonable man or reasonable person standard, requires the trier of fact to consider whether a reasonable woman would consider the conduct in question to be harassment. As the court explained: "If we only examined whether a reasonable person would engage in allegedly harassing conduct . . . [h]arassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy."[190] The court based its decision to use the reasonable woman standard in part on the fact that women are disproportionately victims of rape and sexual assault. Thus, it would be reasonable for a woman to be harmed by harassing conduct that a man might consider harmless.[191] According to the court, the reasonable woman standard "classifies conduct as unlawful sexual harassment even when the harassers do not realize that their conduct creates a hostile working environment."[192] Under the reasonable woman standard, the *Ellison* court held that the conduct of the plaintiff's coworker created a hostile work environment.

D. *Judicial Treatment of Hostile Environment Sexual Harassment Claims Under Title IX*

Under both the Supreme Court's decision in *Meritor* and the EEOC Guidelines, creation of a hostile environment in the workplace clearly violates Title VII. Neither courts, the DOE, nor Congress, however, have provided guidance for the treatment of hostile environment sexual harassment cases brought under Title IX.[193] While courts seem comfortable with the idea that Title IX prohibits

189. For a review of the reasonable women standard, see Debra A. Profio, *Ellison v. Brady: Finally, A Woman's Perspective*, 2 UCLA WOMEN'S L.J. 249 (1992).

190. *Ellison*, 924 F.2d at 878.

191. *Id.* at 879.

192. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).

193. In Cannon v. University of Chicago, the Supreme Court held that private individuals could bring suit against institutions for violations of Title IX. 441 U.S. 677 (1979). A plaintiff does not have to exhaust her institutional remedies before pursuing a private remedy. *Id.* at 717. According to the Court, a private cause of action is not inconsistent with Congress' intent in passing Title IX. The Court based its decision in part on the fact that Title VI, after which Title IX is patterned, permits a private cause of action. *Id.* at 694. The Court found further support for its conclusion in the fact that the Department of Health, Education and Welfare (the agency then responsible for enforcing Title IX) "perceive[d] no inconsistency between the private remedy and the public remedy. On the contrary, the agency takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes." *Id.* at 706–07 (citation omitted).

quid pro quo sexual harassment under certain circumstances,[194] they have not reached a consensus on whether Title IX also prohibits hostile environment sexual harassment.[195] Even those courts that theoretically accept Title IX hostile environment claims have not yet fully developed an analytical framework within which to evaluate such cases. This lack of clarity and guidance presents imposing barriers to victims of hostile environment sexual harassment seeking redress under Title IX.[196]

In 1977, five female Yale students and one male professor brought the first case involving a hostile environment claim under Title IX.[197] In *Alexander v. Yale University*, the plaintiffs claimed that Yale violated Title IX by tolerating several types and instances of sexual harassment.[198] Plaintiffs sought a court order requiring Yale to institute grievance procedures for victims of sexual harassment. The federal district court dismissed four of the five student plaintiffs on the basis that their allegations did not state a cause of action under Title IX. Of these four students, one alleged that she abandoned her study of music at Yale after her music instructor sexually harassed her and coerced her into intercourse.[199] Another student alleged that Yale administrators treated her with indifference when she investigated the alleged sexual harassment of other students and brought these charges to the attention of the administration.[200] A third student claimed to have suffered serious emo-

194. *See, e.g.*, Alexander v. Yale Univ., 631 F.2d 178, 184–85 (2d Cir. 1980); Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989); Alexander v. Yale Univ., 459 F. Supp. 1, 3 (D. Conn. 1977).

195. *See infra* text accompanying notes 197–234.

196. Despite these burdens, commentators predict that victims of student to student sexual harassment will increasingly turn to Title IX for protection:

> Probably the one area least addressed under Title IX . . . is that of peer harassment. With the current campus atmosphere concerning female student safety, and the heightened awareness of the area of 'acquaintance rape,' this area will accelerate into importance. Women students will increasingly turn to Title IX to force institutions to protect them from abuse by fellow students.

Hendrickson et al., *supra* note 123, at 678. Alison Wetherfield agrees:

> Under Title IX, all cases so far reported have involved abuses of power by teachers, for whose misconduct the institution will be strictly liable in the absence of sufficient policies and enforcement, but it is likely that a case involving unchecked harassment by student peers might result in liability for an institution which knowingly took no steps to intervene.

Alison Wetherfield, *Sexual Harassment: The Current State of the Law Governing Educational Institutions*, INITIATIVES, Winter 1990, at 23, 26.

197. Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977).

198. *Id.* at 3.

199. Alexander v. Yale Univ., 631 F.2d 178, 181 (2nd Cir. 1980).

200. *Alexander*, 459 F. Supp. at 3.

tional distress upon learning that a university employee sexually harassed a fellow student.[201] The fourth student alleged that she experienced humiliation and distress as a result of sexual harassment perpetrated by her field hockey coach.[202] The court also dismissed the plaintiff professor for failure to state a claim, despite his allegation that Yale's tolerance of sexual harassment caused female students to distrust male professors and that this distrust hampered his teaching.[203] In rejecting these claims, the court stated:

> None of these claims is of personal exclusion from a federally funded education program or activity, or of the personal denial of full participation in the benefits of such a program or activity in any measurable sense. No judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong.[204]

The district court found that only one plaintiff, Pamela Price, stated an actionable claim under Title IX.[205] Price alleged that a professor from whom she was taking a course offered to give her an 'A' in return for sexual favors, that she refused his demands, and that he gave her a 'C' as a result of her refusal. Price complained to the Yale administration and was told that nothing could be done to help her.[206] Price alleged that the 'C' grade did not reflect her academic performance in the course and that the low grade could damage her chance of admission to law school.[207] The district court found that Price stated a valid *quid pro quo* claim under Title IX:

> In plaintiff Price's case . . . it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment.[208]

On appeal, the Second Circuit affirmed the district court's decision. It found that all of the student plaintiffs, including Price, failed to meet the prerequisites of justiciability because their claims had become moot by virtue of their graduation from Yale.[209] The

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201. *Id.*
202. *Alexander*, 631 F.2d at 181.
203. Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977).
204. *Id.* at 3.
205. *Id.* at 4–5.
206. Alexander v. Yale Univ., 631 F.2d 178, 182 (2nd Cir. 1980).
207. *Alexander*, 459 F. Supp. at 4.
208. Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977).
209. *Alexander*, 631 F.2d at 183. The professor did not join the appeal. *Id.* at 182 n.2. The fact that sexual harassment suits may very well become moot before resolution

Second Circuit noted that its decision was influenced by the fact that Yale had since adopted a sexual harassment policy and grievance procedure, which was the relief sought by the plaintiffs.[210]

In the 1985 case, *Moire v. Temple University School of Medicine*,[211] a female physician, Laura Moire, participating in a psychiatric clerkship brought a Title IX claim against her medical school. Moire claimed that her supervisor, Dr. Crabtree, sexually harassed her and that the administration failed to provide adequate grievance procedures as required under Title IX.[212] The alleged harassment began during a private meeting between Moire and Dr. Crabtree, which he called to admonish Moire for her allegedly disruptive behavior. Moire claimed that during the meeting Dr. Crabtree told her that he was attracted to her, and that since his attraction was causing jealousy among the staff, she should "keep a low profile."[213] Dr. Crabtree claimed that he commented on Moire's attractiveness because "he felt it important to say something supportive before saying something negative"[214] and that he "also intended to make plaintiff more sensitive to the concerns of clinical psychiatry; as part of that lesson, he thought she must be made aware of how she might be viewed by others."[215]

In considering the Title IX claim, the *Moire* court stated in a footnote that Title VII theory should inform Title IX sexual harassment cases. "The Equal Employment Opportunity Commission ('EEOC') Guidelines . . . explicitly recognize these two types of harassment [*quid pro quo* and hostile environment] . . . . Though the sexual harassment 'doctrine' has generally developed in the context of Title VII, these guidelines seem equally applicable to Title IX."[216] Applying the Title VII hostile environment theory to the

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due to plaintiff's graduation has been explored by commentators addressing the sexual harassment of students. *See, e.g.*, Schneider, *supra* note 15, at 527; DZEICH & WEINER, *supra* note 19, at 52. For an excellent review of the barriers students face in bringing Title IX suits, see Mango, *supra* note 33, at 391, 397 (barriers include students' limited stay at university, difficulty gaining class certification, short statute of limitations, and Title IX's exemption for single-sex schools).

210. *Alexander*, 631 F.2d at 184.

211. Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985).

212. *Id.* at 1366.

213. *Id.* at 1367.

214. *Id.*

215. *Id.*

216. *Id.* at 1366 n.2 (citations omitted). Courts have recognized a link between Title IX and Title VII in at least one other instance. In Mabry v. State Bd. of Community College and Occupational Educ., a physical education coach terminated from her position at a junior college alleged discrimination on the basis of marital, parental head of household, and wage-earner status, all of which are prohibited under both Title IX and

facts of *Moire*, however, the court found that the plaintiff misconstrued her supervisor's conduct:

> [T]he court finds that plaintiff's trial version of the first meeting with Dr. Crabtree lacked credibility. Her inconsistency may not necessarily have resulted from intentional misstatement but from her admitted inability correctly to perceive men's attitudes and intentions towards her. . . . She testified that ever since her high school years, she had trouble discerning when men were 'making a pass' at her and when they were just being friendly and complimentary.[217]

While the court dismissed the plaintiff's sexual harassment claim, it accepted the idea that a hostile environment claim could be actionable under Title IX.[218] Drawing from Title VII theory, the court stated:

> Harassment from an abusive environment occurs where multiple incidents of offensive conduct lead to an environment violative of a victim's civil rights. Here there is no allegation of *quid pro quo* harassment. . . . The issue is whether plaintiff because of her sex was in a harassing or abusive environment.[219]

Although the *Moire* court did not find that the particular conduct at issue constituted hostile environment sexual harassment, the *Moire* court, unlike the *Alexander* court, expressed no hesitation in applying Title VII hostile environment sexual harassment theory to a Title IX case.

Title VII. 813 F.2d 311, 316 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). The Tenth Circuit found that Mabry's discrimination claims were cognizable under Title VII, thus precluding her Title IX claim. *Id.* at 316. While *Mabry* was thus ultimately decided under Title VII, the court did find some link between Title IX and Title VII in holding that Title VII precluded her Title IX claims. "We find no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits." *Id.* In a footnote, the court further explained that "because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards. . . ." *Id.* at n.6. The court also noted that the language of Title IX is similar to that of Title VII. *Id.* at 317. While the facts of this case involved *quid pro quo* employment discrimination rather than hostile environment sexual harassment, the arguments for drawing upon Title VII theory remain valid for both prongs of sexual harassment law.

217. Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360, 1369 (E.D. Pa. 1985).

218. The facts as presented by the court do not reveal whether Moire had only student status or whether she also received compensation for her psychiatric clerkship. If she received compensation and was considered an employee, she would have had a claim under Title VII. *See* Cambell v. Board of Regents, 770 F. Supp. 1479 (D. Kan. 1991); Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990). However, as the court never refers to Moire as an employee of the University, presumably she is of student status similar to the student plaintiffs in *Alexander*.

219. *Moire*, 613 F. Supp. at 1366–67 (citations omitted).

In *Bougher v. University of Pittsburgh*,[220] a 1989 Title IX hostile environment sexual harassment case, a student, Ruth Ann Bougher, alleged that a professor, Trevor Melia, sexually harassed her and that the University failed to provide an adequate grievance procedure. Bougher claimed that Melia, from whom she took one course as an undergraduate student, sexually harassed her and coerced her into a sexual relationship after she completed his course.[221] Bougher eventually sought psychiatric therapy for her resulting suicidal depression.[222] Bougher further alleged that Melia continued to harass her when she commenced graduate work, again at the University of Pittsburgh, and that the harassment caused her to abandon her graduate studies.[223] When she reported the harassment to University administrators, Bougher alleged that one administrator became abusive and hostile,[224] and other officials also refused to pursue her complaint.[225]

Analogizing to Title VII, Bougher charged the University with tolerating both *quid pro quo* and hostile environment sexual harassment in violation of Title IX.[226] The court dismissed her *quid pro quo* claim, finding that "[e]ven accepting plaintiff's uncorroborated allegations as true . . . she does not allege the denial of any benefit by [the University] to her on the basis of sex. . . . There is, therefore, no *quid pro quo* claim."[227] The court then refused to find that Title IX covered hostile environment sexual harassment and admonished Bougher for trying to extend Title VII theory to the educational environment absent a clear directive from Congress.

> [T]o suggest, as plaintiff must, that unwelcome sexual advances, from *whatever* source, official or unofficial, constitute Title IX violations is a leap into the unknown which, whatever its wisdom, is the duty of Congress or an administrative agency to take. Title IX simply does not permit a "hostile environment" claim as described for the workplace.[228]

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220. 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

221. Bougher v. University of Pittsburgh, 882 F.2d 74, 75–76 (3d Cir. 1989).

222. *Id.* at 76.

223. *Id.*

224. *Id.*

225. *Id.*

226. Bougher v. University of Pittsburgh, 713 F. Supp. 139, 143 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

227. *Id.* at 144.

228. *Id.* at 145. Moreover, because the court found that Title IX did not protect against hostile environment sexual harassment, it dismissed the claim that the University failed to provide adequate grievance procedures as required under Title IX. "Plaintiff further lacks standing to challenge the adequacy of [University of Pittsburgh's]

On appeal, the Third Circuit found that Pennsylvania's two-year statute of limitations barred plaintiff's case and, thus, the court refrained from deciding whether Title IX extended to hostile environment claims.[229] However, the Third Circuit rejected the district court's narrow reading of Title IX: "[W]e decline to adopt [the lower court's] reasoning *in toto* and we find it unnecessary to reach the question, important though it may be, whether evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX."[230]

Courts are clearly split on the question of whether Title IX embraces a hostile environment cause of action. The *Alexander* court refused to find that Title IX included a hostile environment prong,[231] the *Moire* court voiced no objection to a plaintiff bringing a hostile environment claim under Title IX,[232] and the *Bougher* court looked to Congress for guidance on this question.[233] Moreover, although the *Moire* court accepted the hostile environment cause of action, it failed to establish a framework within which such claims could be brought under Title IX.[234]

Thus, the present state of Title IX law presents several barriers to legal redress for student to student sexual harassment: first, the text of Title IX does not mention sexual harassment as a form of sex discrimination; second, the regulations promulgated under Title IX do not explicitly cover hostile environment sexual harassment; third, courts do not clearly recognize hostile environment sexual harassment as violative of Title IX; and fourth, no court has yet developed an analytic framework for hostile environment claims under Title IX. While students victimized by noncompliance with Title IX may bring private suits against these institutions, it remains uncertain whether, under current interpretations, Title IX includes a hostile environment prong which could provide meaningful protection for victims of student to student sexual harassment.

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gender nondiscrimination policy, since she does not assert any grievance to her that the university had a duty to hear." *Id.*

229. Bougher v. University of Pittsburgh, 882 F.2d 74, 77 (3d Cir. 1989).

230. *Id.*

231. Alexander v. Yale Univ., 459 F. Supp. 1, 3 (D. Conn. 1977).

232. Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360, 1366 n.2, 1366–67 (E.D. Pa. 1985).

233. Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

234. 613 F. Supp. at 1369.

III. PROVIDING A JUDICIALLY-CREATED REMEDY FOR VICTIMS OF STUDENT TO STUDENT SEXUAL HARASSMENT UNDER A BROAD INTERPRETATION OF TITLE IX

Courts must provide a remedy for student to student sexual harassment. They can do so by interpreting Title IX to prohibit the creation of a hostile environment, similar to the prohibition under Title VII.[235] Under a Title IX hostile environment theory, courts would find that a university created a hostile environment, and thus violated Title IX, when it had knowledge of student to student sexual harassment but failed to provide an adequate grievance procedure through which the victim could seek redress.[236] In finding that hostile environment sexual harassment violated Title VII, the judiciary recognized that women should not have to "run the gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."[237] Likewise, students should not have to suffer student to student sexual harassment while attending a federally funded educational institution.[238] Without a hostile environment component, Title IX will fail in its goal to provide an education free from sex discrimination.[239]

This Part outlines a proposal through which courts, independent of any direction from Congress or the DOE, could provide protection against student to student sexual harassment under Title IX.

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235. *See supra* text accompanying notes 144–192.

236. *See infra* notes 240–290. Indeed, it can be argued that hostile environment sexual harassment is already prohibited under a broad interpretation of Title IX's umbrella regulation which provides: "A recipient shall not, on the basis of sex: . . . (7) [o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R. § 106.31(b)(7) (1991). As student to student sexual harassment, and other forms of hostile environment sexual harassment, clearly limit students' educational opportunities, the courts could find support for a broad interpretation of Title IX in this regulation.

237. Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

238. Ronna Schneider, in criticizing the district court's decision in *Alexander*, succinctly outlines the importance of allowing hostile environment claims under Title IX:

> The court's refusal to recognize maintenance of an offensive educational environment as sexual harassment under Title IX ignores a critical element of learning in any academic institution — the creation and fostering of an environment conducive to intellectual growth. The academic environment existing at an educational institution is extremely important in determining the benefit that a student receives from attending that institution. Any diminution in value is, therefore, a reduction in the educational benefit that student receives.

Schneider, *supra* note 15, at 540.

239. See *supra* text accompanying notes 110–118 for a brief outline of Title IX's legislative history.

The proposal employs a four-part test for evaluating student to student sexual harassment claims.

The first three prongs of the proposed test are derived from the test established by the Ninth Circuit in *Ellison v. Brady*.[240] First, the plaintiff must show that "she was subjected to . . . conduct of a sexual nature."[241] Second, she must show that this conduct was unwelcome.[242] Third, she must show that "the conduct was sufficiently severe or pervasive to alter the conditions of [her]"[243] education or to create an abusive environment. Fourth, in addition to the *Ellison* test, the plaintiff must demonstrate that the university had notice of the harassment but took no remedial actions.

The plaintiff must first demonstrate that she was subjected to some conduct "of a sexual nature."[244] To provide meaningful protection against student to student sexual harassment, courts should adopt a broad and flexible definition of what behavior can be classified as harassing conduct. Courts have long recognized the necessity of using flexible definitions when interpreting hostile environment claims in the Title VII context:

> Congress chose [not] . . . to enumerate specific discriminatory practices . . . knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. . . . We must be acutely conscious of the fact that Title VII . . . should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of . . . discrimination.[245]

Title IX hostile environment cases require the same flexibility. Courts should recognize that physical, verbal, and visual conduct can all create a hostile environment.[246] Each type of student to student sexual harassment cited in this Article,[247] including, but not limited to, sexual comments or slurs, demands (either implicit or explicit)[248] that women engage in sexual relations or expose their bodies, and pornographic displays in common areas should be

240. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

241. *Id.* at 875 (footnote omitted).

242. *Id.* at 875–76.

243. *Id.* at 876.

244. *Id.* at 875.

245. Rodgers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

246. For a sample of articles discussing the the First Amendment implications of limiting speech, particularly in the educational environment, see *supra* note 25.

247. *See supra* notes 20–25, 66 and accompanying text.

248. An implicit demand could be found in the example of a fraternity having a *Platoon* party, *supra* note 24, where the title of the party itself does not indicate an

treated as actionable conduct.[249] A more limited definition of the conduct covered by Title IX would frustrate the congressional intent to prohibit sex discrimination in higher education.

Second, the plaintiff must demonstrate that the conduct was unwelcome.[250] In the Title VII context "[i]n order to constitute harassment, th[e] conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."[251] Courts should adopt the same definition of "unwelcome" in the Title IX context.

Under Title VII, the question of whether the conduct is unwelcome is judged from the totality of the circumstances. The EEOC Guidelines provide:

> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the *totality of the circumstances*, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.[252]

In *Meritor*, the Supreme Court cited the EEOC Guidelines with approval[253] and used the totality of the circumstances test to find that the conduct at issue in that case could create a hostile environment.[254] Following the Supreme Court's lead in Title VII hostile environment cases, courts should apply the totality of the circumstances test when deciding whether alleged harassing conduct con-

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explicit demand that female invitees engage in sex with the fraternity brothers, but the implicit meaning is clear to both the aggressor and the victim.

249. According to *Rabidue*, displays of pornography do not create a hostile environment. 805 F.2d 622 n.7. Other courts disagree with this conclusion. *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1986); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1525–26 (M.D. Fla. 1991); Barbetta v. Chemlawn Services Corp., 669 F. Supp 569, 573 n.2 (W.D.N.Y. 1987). The EEOC also takes the position that the proliferation of pornography in the workplace could create a hostile environment. EEOC Policy, *supra* note 14, at 18.

250. For an excellent critique of the unwelcomeness requirement, see Estrich, *supra* note 89, at 833.

251. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

252. 29 C.F.R. § 1604.11(b) (1991) (emphasis added).

253. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986).

254. *Id. See also* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Henson*, 682 F.2d at 904; *Jacksonville Shipyards*, 760 F. Supp. at 1523. Commentators criticize Justice Rehnquist's determination that the plaintiff's "sexually provocative speech or dress" should be considered under the totality of the circumstances test. *Meritor*, 477 U.S. at 69. "If Vinson's speech or dress was inappropriate for the work environment, she should have been told, not raped." Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 56 (1990).

stitutes impermissible student to student sexual harassment under Title IX.[255]

Courts hearing Title IX hostile environment cases should reject the totality of the circumstances test as laid out by the *Rabidue* majority. According to the *Rabidue* court, the following factors are relevant considerations in the totality of the circumstances test:

> [A] proper assessment or evaluation of an employment environment that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.[256]

This interpretation of the totality of the circumstances test has been widely criticized by the *Rabidue* dissent,[257] other courts,[258] and the EEOC.[259] In rejecting the majority opinion, the *Rabidue* dissent stated: "[t]he majority suggests through these factors that a woman assumes the risk of working in an abusive, antifemale atmosphere. Moreover, the majority contends that such work environments somehow have an innate right to perpetuation . . . ."[260] The EEOC also rejected the factors outlined by the *Rabidue* majority: "The Commission believes these factors rarely will be relevant and agrees with the dissent in *Rabidue* that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment."[261] The EEOC further stated: "evidence concerning

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255. The *Jacksonville Shipyards* court explained the need for a holistic view of the totality of circumstances test:

> [T]he analysis [of a hostile environment claim] cannot carve the work environment into a series of discrete incidents and measure the harm adhering in each episode. Rather, a holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes.

760 F. Supp. at 1524 (M.D. Fla. 1991).

256. *Rabidue*, 805 F.2d at 620.

257. *Id.* at 626 (Keith, J., dissenting).

258. Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1986); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1526 (M.D. Fla. 1991); Barbetta v. Chemlawn Services Corp., 669 F. Supp 569, 573 n.2 (W.D.N.Y. 1987).

259. EEOC Policy, *supra* note 14, at 17.

260. Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (Keith, J., dissenting).

261. EEOC Policy, *supra* note 14, at 17.

a charging party's general character and past behavior towards others has limited, if any, probative value and does not substitute for a careful examination of her behavior towards the alleged harasser."[262]

The EEOC suggests an alternative list of factors which should be taken into consideration when applying the totality of the circumstances test in hostile environment cases. These factors reflect more relevant considerations than those suggested by the *Rabidue* majority, and include:

> (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; . . . (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.[263]

The EEOC suggests consideration of additional factors when addressing purely non-physical harassment: "Did the alleged harasser single out the charging party? Did the charging party participate? . . . . Were the remarks hostile and derogatory?"[264] Courts hearing Title IX student to student sexual harassment cases should apply these factors when considering whether conduct was unwelcome under a totality of the circumstances test.

Third, the plaintiff must demonstrate that the "conduct creates an intimidating, hostile, or offensive environment *or* . . . unreasonably interferes with work performance."[265] In a student to student sexual harassment case, the plaintiff must prove either that the conduct created an intimidating, hostile, or offensive environment, or that it interfered with some aspect of her educational experience.[266] The court should not require the plaintiff to show both types of harm to prevail. For instance, if a plaintiff demonstrated that student to student sexual harassment created an offensive environment, she would not also have to show that the harassment interfered with her study habits.[267]

Courts should not require plaintiffs to show that the harm caused by the student to student sexual harassment was extremely

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262. *Id.* at 9–10.

263. *Id.* at 13.

264. *Id.* at 16.

265. Ellison v. Brady, 924 F.2d 872, 876–77 (9th Cir. 1991).

266. The term "educational experience" should be broadly interpreted to cover not only academic performance, but also athletic activities, membership in student groups, and all other activities sponsored or officially condoned by the university.

267. The inverse is, of course, true as well. If she could show that the harassment unreasonably interfered with her studying, she would not have to show that the harassment also created an intimidating environment.

severe to successfully demonstrate that the harassment created a hostile environment. The *Rabidue* court required that a plaintiff in a Title VII hostile environment case demonstrate that the harassment "affected seriously her psychological well-being."[268] The *Ellison* court rejected this standard, as did the EEOC.[269] As the *Ellison* court stated:

> It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation. . . . Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.[270]

The EEOC agreed: "[I]t is the Commission's position that it is sufficient for the charging party to show that the harassment . . . would have substantially affected the work environment of the reasonable person."[271] Similarly, courts should reject the more stringent *Rabidue* standard of harm in the Title IX context. If courts required plaintiffs in student to student sexual harassment cases to demonstrate serious psychological harm, Title IX would not work to *protect* victims from the harm of student to student sexual harassment. The damage would already be done; the victims would have already lost their Title IX right to an education free from sex discrimination.

Questions will arise as to whether the harassing conduct must be repeated to create a hostile environment under Title IX. According to *Ellison*: "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."[272] Thus, under Title VII, "although a single act can be enough . . . generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident."[273] Under Title IX, in considering the same question

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268. Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

269. EEOC Policy, *supra* note 14, at 14 n.18 ("[I]t is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of the reasonable person.").

270. *Ellison*, 924 F.2d at 878.

271. EEOC Policy, *supra* note 14, at 14 n.18.

272. *Ellison*, at 878.

273. *Id.* (quoting King v. Board of Regents of Univ. of Wisconsin, 898 F.2d 533, 537 (7th Cir. 1990)).

of whether student to student sexual harassment must be repeated to be actionable, a court might be tempted to apply a stricter standard than under Title VII, due to the differences between a university and a workplace environment. The fact that campuses usually occupy a larger physical area than the average workplace might lead a court to believe that a victim could easily avoid repeated harassment by simply staying away from her harasser. Based on such assumptions, a court could hold that a single instance of student to student sexual harassment is always insufficient to create a hostile environment.

Such assumptions about students' lives and campus sexual harassment would be misinformed. First, it is not always easy to avoid other students, even on a large college campus. The victim and her harasser may take classes together, use the same recreation or laboratory facilities, and even live together in university housing. Because the university encompasses many aspects of a student's life, such as housing, recreation, athletics, and political and social activities, in addition to her education, the college campus may, in actuality, be *more* insular than the workplace.[274] Second, a standard which requires repeated harassment places a burden on the victim to avoid the harasser after the first instance of harassment. Such a situation, in which the victim must constantly look over her shoulder in an attempt to avoid her harasser, seems by definition to be a hostile environment. Finally, one instance of student to student sexual harassment may be sufficiently severe to create a hostile environment when considered in the totality of the circumstances. In the Title VII context, "a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents."[275] Similarly, a single instance of student to student harassment could be severe enough to intimidate a student or negatively affect her performance. Thus, courts hearing student to student sexual harassment cases under Title IX should apply the *Ellison* standard, which considers both the pervasiveness *and* the severity of the harassment.[276]

Again following *Ellison*'s lead, courts should adopt a reasonable woman standard in judging student to student sexual harass-

274. *See* Matsuda, *supra* note 25, at 2370–72 nn.249–57.
275. EEOC Policy, *supra* note 14, at 15. *See also Ellison*, 924 F.2d at 878.
276. *Ellison*, 924 F.2d at 878.

ment claims under Title IX.[277] Women and men often interpret the same conduct differently — what women experience as sexual harassment, men may see as mere flirtation or flattery.[278] The *Ellison* court attributed this difference in perspective in part to the fact that women face a far greater risk of becoming victims of sexual violence:

> [B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman might perceive.[279]

Like employed women, university women can identify a threat of physical sexual violence in sexual harassment. Arguably, the perceived threat of sexual violence from a harassing man student may be more acute than the perceived threat in an employment situation. University students are more likely to encounter each other in almost every facet of their lives, including their living situations, recreation, social gatherings, and classes.[280]

By focusing on the victim's perception of the conduct, the reasonable woman standard will more effectively prohibit conduct which creates a hostile environment than the reasonable person standard. According to the *Ellison* court: "If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination."[281] At the same time, the requirement that the con-

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277. Other courts have also used the reasonable woman standard in hostile environment Title VII cases. *See, e.g.*, Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1986); EEOC v. Blue Diamond Growers Ass'n, No. CIV.A.90-2281, 1992 WL 16326 (D.N.J. Jan. 28, 1992); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1526 (M.D. Fla. 1991); Harris v. International Paper, 765 F. Supp. 1509, 1515 (D. Me. 1991), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991); Tindall v. Housing Authority, 762 F. Supp. 259, 262 (W.D. Ark. 1991); Jenson v. Eveleth Taconite Co., 60 USLW 2451 (D.C. Minn. Dec. 16, 1991); Smolsky v. Consolidated Rail, 780 F. Supp. 283 (E.D. Pa. 1991); Shrout v. Black Clawson Co., 689 F. Supp. 774, 782 (S.D. Ohio 1988); Barbetta v. Chemlawn Services Corp., 669 F. Supp 569, 572 (W.D.N.Y. 1987). *See also* Schneider, *supra* note 15, at 538. For a critique of use of the reasonable person standard in sexual harassment cases, see Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

278. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

279. *Id.* at 879 (citations omitted).

280. *See supra* note 274.

281. *Ellison*, 924 F.2d at 878.

duct be sufficiently severe according to a *reasonable* woman protects universities against claims by hyper-sensitive female students.[282]

In addition to the three-part *Ellison* test, students bringing claims for student to student sexual harassment under Title IX should be required to show that the university knew or reasonably should have known of the harassment. Such a requirement avoids placing an unfair burden on the university and at the same time encourages victims to resolve the problem though internal grievance procedures. "If knowledge is a prerequisite to liability . . . students will be encouraged to complain to the institution. Without such encouragement, the likelihood of resolving sexual harassment complaints at the institutional level will be reduced significantly."[283]

While a stricter form of liability may appeal to those concerned with protecting student victims, a stricter standard would be unfair to a university for the following reasons:

> First, the parameters of the illegal sexual harassment are very difficult to define. . . . Second, sexual harassment, by its nature, often occurs in private, beyond the purview of the . . . institution's administration. Thus, even careful vigilance by the . . . institution cannot necessarily prevent the offensive behavior. Third, the imposition of absolute liability upon the . . . institution may result in punishing the . . . institution for behavior it deplores and has tried to eradicate.[284]

Furthermore, universities do not (and arguably cannot and should not) exercise the extreme regulatory control over students which a strict vicarious liability rule would require. Prior to the 1970s, universities acted as surrogate parents for young adult students under the *in loco parentis*[285] regime, which allowed universities a great degree of control over student morality and activities. Under the *in loco parentis* theory, courts routinely held universities liable for harm to students.[286] Universities, and the courts, moved away from the *in loco parentis* regime following the Vietnam war and campus unrest of the 1960s,[287] when students demanded to be

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282. *Id.* at 879.

283. Schneider, *supra* note 15, at 570.

284. *Id.* at 568.

285. "In the place of a parent; instead of a parent; charged, fictitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY, *supra* note 26, at 403.

286. *See* James J. Szablewicz & Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, J.L. & EDUC. 453, 455 (1987).

287. *Id.* at 456–57. Not all commentators are in favor of the decline of *in loco parentis*. *See, e.g.*, Michael Clay Smith, *College Liability Resulting From Campus Crime: Resurrection for In Loco Parentis?*, 59 WEST EDUC. L. REP. 1 (1990); Douglas

treated as adults, free to make their own choices about their education, beliefs, and conduct.[288] Universities complied, allowing students a great deal of freedom to pursue diverse lifestyles.[289] Accordingly, courts generally refuse to hold universities primarily responsible for student safety.[290] Thus, a requirement that the university have knowledge of student to student sexual harassment before incurring liability under Title IX seems to more accurately reflect the modern relationship between a university and its students.

Courts should provide a remedy for victims of student to student sexual harassment by broadly interpreting Title IX to include a hostile environment component. Under a Title IX hostile environment theory, universities that knew of but failed to remedy student to student sexual harassment would be in violation of Title IX's mandate to provide an education free from sex discrimination. Courts will frustrate the goal of Title IX if they refuse to provide protection for victims of student to student sexual harassment

IV. ACTIONS AVAILABLE TO CONGRESS OR THE DEPARTMENT OF EDUCATION TO PROHIBIT STUDENT TO STUDENT SEXUAL HARASSMENT UNDER TITLE IX

Congress and the DOE share responsibility with the judiciary for protecting victims of student to student sexual harassment. Alternative proposals for protecting victims involve a directive from Congress or the DOE clearly indicating that Title IX prohibits such harassment. Ideally, Congress should amend Title IX to include a specific prohibition against all sexual harassment which creates a hostile environment, including student to student sexual harassment. Alternatively, the DOE should promulgate regulations interpreting the Title IX prohibition against sex discrimination to include an explicit prohibition against all forms of sexual harass-

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R. Richmond, *How One Bad Decision Has Shaped The Law Of Higher Education: Bradshaw v. Rawlings*, 56 WEST EDUC. L. REP. 411 (1989).

288. Szablewicz & Gibbs, *supra* note 286, at 456.

289. *Id.*

290. *Id.* at 457. *See also* Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979), *cert. denied*, 446 U.S. 909 (1980). For a discussion of a university's tort liability for foreseeable harm to students, see Miller v. State, 62 N.Y.2d 506, 467 N.E.2d 493 (1984) (university liable for rape of student in a campus dormitory under landlord theory of liability); Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984) (university liable for sexual assault of student in campus parking lot under landowner theory of liability); Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331 (1983) (university liable for sexual assault of student on campus based on special relationship between university and student).

ment. While a congressional amendment clearly would carry more legal and symbolic weight, DOE regulations would certainly provide more guidance for courts and universities than currently exists. The fact that victims of student to student sexual harassment are without a reliable remedy, and that the federal judiciary is without guidance on this issue, are clear indications that Congress or the DOE should revisit Title IX's prohibition against sex discrimination.

The first section of this Part proposes a model congressional amendment to Title IX. The proposed amendment would clarify and broaden the scope of Title IX and thus move closer to Title IX's goal of prohibiting sex discrimination in educational institutions receiving federal funds. The second section proposes both a model definition of sexual harassment and specific implementing regulations which the DOE should adopt to provide more comprehensive protection against sex discrimination.

A. *Congressional Action: Amending Title IX to Explicity Prohibit all Forms of Sexual Harassment*

Several factors point to the need for congressional attention to Title IX. First, when Congress passed Title IX in 1972, sexual harassment was not recognized as a form of sex discrimination,[291] and Title IX makes no mention of sexual harassment of any form in its text. Given the heightened awareness of the pervasiveness and harm of sexual harassment, Congress should revisit the question of whether Title IX prohibits sexual harassment in federally funded education programs. Second, as demonstrated above, the protection against sexual harassment provided by courts has thus far proven incomplete and unsatisfactory. Courts interpreting Title IX disagree on the scope of protection it provides against sexual harassment and have yet to produce a clear framework under which Title IX hostile environment sexual harassment cases can be heard. Direction from Congress on this important issue would allow the courts to address Title IX sexual harassment cases in a more uniform and fair manner. Third, the DOE remains unclear about Title IX's coverage of sexual harassment, failing even to generate an official definition of sexual harassment. Congressional attention to the problem of sexual harassment in educational institutions would provide an incentive for the DOE to promulgate comprehensive regulations concerning sexual harassment. These three factors — the

291. *See supra* text accompanying notes 110–118.

growing public recognition that sexual harassment is a serious form of sex discrimination, judicial inconsistency in deciding whether hostile environment sexual harassment falls within the scope of Title IX, and the DOE's failure to provide guidance concerning Title IX's prohibition against sexual harassment — strongly point to the need for Congress to provide leadership in the debate over the scope of Title IX's promise to provide an education free from sex discrimination.[292]

Congress should amend Title IX to remedy the confusion concerning its coverage of sexual harassment. Such an amendment would make clear that all forms of sexual harassment, including hostile environment sexual harassment perpetrated by any member of the university community, are prohibited in educational institutions receiving federal funds. A model amendment would read: "No person in the United States shall be subjected to sexual harassment in any form, from any person or entity, under any educational program or activity receiving federal financial assistance."

Should Congress adopt such an amendment, the DOE would have a clear mandate to promulgate implementing regulations enforcing the amendment. Institutions which failed to comply with the congressional amendment and the resulting regulations would risk delay or loss of their federal funds under Title IX's existing enforcement provisions.[293]

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292. Congress has indicated concern with the degree of sexual violence on university campuses. The Crime Awareness and Campus Security Act of 1991 requires universities to prepare and distribute to the campus community an annual security report containing statistics of crime on campus and current policies concerning security on campus. Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2384 (Nov. 8, 1990). The Act recognizes the "clear need . . . to encourage the development of policies and procedures to address sexual assaults . . . on campus." *Id.* at § 202 (7)(C). In 1991, Senator Biden introduced the Campus Sexual Assault Victims' Bill of Rights, which would ensure to all victims of sexual assault on a campus the

> right to have any and all sexual assaults against them be treated with seriousness; the right, as victims, to be treated with dignity. . . . The right to have sexual assaults committed against them investigated and adjudicated by the duly constituted criminal and civil authorities. . . . The right to be free from any kind of pressure from campus personal that victims (1) not report crimes committed against them to civil and criminal authorities . . . or (2) report crimes as lesser offenses than the victims perceived them to be.

Campus Sexual Assault Victims' Bill of Rights, S. 1222, 102d Cong., 1st Sess., § 2 (1991).

293. 20 U.S.C. § 1682 (1988).

B. *DOE Action: Interprting Existing Title IX Language to Cover Student to Student Sexual Harassment*

Absent a congressional amendment, the DOE could interpret the existing Title IX language to prohibit all forms of sexual harassment. The first step in implementing such an interpretation would be promulgation of an official definition of sexual harassment. A model definition would provide:

> Unwelcome sexual advances, requests for sexual favors, verbal comments and slurs, or any other conduct of a sexual nature perpetrated by any member of the campus community shall constitute sexual harassment when, at an institution receiving federal financial assistance: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's participation in the benefits of any educational program or activity, or any other activity which the institution sponsors, condones, or participates in, (2) submission or rejection of such conduct by an individual is used as the basis for decisions or conduct affecting that individual, including, but not limited to, the individual's academic evaluation, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's educational experience, including, but not limited to, academic performance, or creating an intimidating, hostile, or offensive environment.

Student to student sexual harassment would clearly fall under the third section, which would resolve in the affirmative that Title IX includes a hostile environment component. This definition of sexual harassment closely resembles the definition of sexual harassment promulgated under Title VII. This similarity would prove useful to courts and universities already familiar with the language of Title VII, as they could look to Title VII law for direction in interpreting the scope of Title IX.

To clarify a university's responsibilities under this definition of sexual harassment, the DOE should issue regulations requiring universities to promulgate policies forbidding all forms of sexual harassment and to provide adequate grievance procedures for the resolution of sexual harassment complaints. The regulations should include specific prohibitions against sexual harassment, including student to student sexual harassment, in dormitories, fraternities and sororities, classrooms, libraries and research facilities, sporting events, gymnasiums, official campus activities, and campus stores and eating areas. The DOE should indicate that these enumerated regulations are not exhaustive by including an umbrella provision covering all other instances of harassment. Such a provision could be modeled after the current Title IX umbrella regulation concern-

ing sex discrimination, which provides: "A recipient shall not, on the basis of sex: . . . (7) [o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity."[294] An umbrella regulation concerning sexual harassment would provide: "A recipient shall not tolerate any sexually harassing conduct which limits the right of any member of the campus community to full participation and enjoyment in her role as student, faculty, or staff within the educational institution." Specific prohibitions coupled with an umbrella regulation would protect students from sexual harassment in all facets of their university experience.

Congress and the DOE should use their power to prohibit sexual harassment in educational institutions receiving federal funds. Congress could provide significant leadership in remedying sexual harassment by amending Title IX to include a clear prohibition against all forms of sexual harassment. Absent a congressional amendment, the DOE should promulgate regulations stating that sexual harassment is a form of sex discrimination prohibited under Title IX and requiring universities to adopt both policies against sexual harassment and adequate grievance procedures. Either congressional or DOE action would provide direction for courts hearing Title IX sexual harassment cases and protection for victims of student to student sexual harassment.

CONCLUSION

Student to student sexual harassment is a serious problem on college campuses. Despite a congressional commitment in 1972 to end sex discrimination in educational institutions receiving federal funds, no existing federal law clearly prohibits student to student sexual harassment. This Article proposes three ways in which this problem could be remedied. First, courts could broadly interpret Title IX to prohibit student to student sexual harassment by analogizing to Title VII's hostile environment sexual harassment theory. Second, Congress could amend Title IX to include a clear prohibition against all forms of sexual harassment. Third, the DOE could promulgate a definition of sexual harassment and accompanying regulations making clear that the current Title IX language prohibits student to student sexual harassment. Some protection, whatever its source, must be provided for the victims of student to student sexual harassment if we are to provide equal and meaningful educational opportunities for the women of this country.

294. 34 C.F.R. § 106.31(b)(7) (1991).